Petition

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No. 81- _____

In The

Supreme Court of the United States

October Term, 1981

SUMMIT VALLEY INDUSTRIES, INC.,
a Montana corporation,
Petitioner,

vs.

LOCAL 112, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

DONALD C. ROBINSON
Poore, Roth, Robischon
& Robinson, P.C.

1341 Harrison Avenue
Butte, Montana 59701
Telephone: (406) 782-1223

Attorney for Petitioner

CUCKLE PRINTING CO., 2311 Douglas St., Omaha 68102

QUESTION PRESENTED

Whether the victim of an illegal secondary boycott is entitled to its attorney fees and related expenses of litigation, which were incurred by it to successfully effect a cessation of the boycott and a resumption of the enterprise in order to mitigate the harm caused by the illegal activity, as compensatory damages under Section 303 (29 U. S. C. §187(b)) of the Labor Management Relations Act of 1947.

TABLE OF CONTENTS

Page

Table of Authorities iii

Opinions Below 2

Jurisdiction 2

Statutes Involved 2

Statement of the Case 4

Argument:

I. Reasons for Granting the Writ 9

A. The Circuit Courts of Appeal Are Divided on the Question Presented. 9

B. The Issue Presents This Court the Opportunity to Provide Victims of Illegal Secondary Boycotts an Effective Remedy by Which They May Vindicate Their Rights Guaranteed by Federal Labor Law and Secure Meaningful Protection of Those Rights. 11

C. The 9th Circuit Rule Conflicts with the Purpose and Language of Section 303. 16

Conclusion 21

Appendices:

A—Ninth Circuit Court Opinion, *Summit Valley Industries, Inc. v. Local 112, United Brotherhood of Carpenters and Joiners of America*, Cause No. 79-4663 (9th Cir. 1981, unpublished opinion) ..... App. 1

B—District Court Opinion, *Summit Valley Industries, Inc. v. Local 112, United Brotherhood of Carpenters and Joiners of America*, 475 F. Supp. 665 (D. Mont. 1979) ..... App. 3

TABLE OF CONTENTS—Continued

Page

C—Opinion, National Labor Relations Board, *Carpenters, Local 112 (Summit Valley Industries)*, 202 NLRB No. 153, 83 LRRM 1013 (1973) ..... App. 8

D—Excerpts of Decision of Administrative Law Judge, National Labor Relations Board (1974, unpublished decision) ..... App. 17

TABLE OF AUTHORITIES

CASES:

Alyeska Pipeline Service Company v. The Wilderness Society, 421 U. S. 240 (1975) 14

Associated General Contractors of Minnesota v. Construction and General Laborers Local No. 563, 612 F. 2d 1060 (8th Cir. 1979) 9, 10, 16, 19

Bryant Air Conditioning & Heating Company, Inc. v. Sheet Metal Workers International Association, Local No. 541, 472 F. 2d 969 (8th Cir. 1973) 9

Capeletti Brothers, Inc. v. Local 487, 514 F. 2d 1239 (5th Cir. 1975) 9

Carpenters, Local 112 (Summit Valley Industries), 202 NLRB No. 153, 83 LRRM 1013 (1973) 6

Carpenters, Local 112 (Summit Valley Industries), 217 NLRB No. 129, 89 LRRM 1799 (1975) 6

Carpenters Local 1976 v. NLRB, 357 U. S. 93 (1958) 12

Chamber of Commerce of the United States v. NLRB, 439 U. S. 981 (1978) 8

TABLE OF AUTHORITIES—Continued

Page

DeArroyo v. DeTrabajadores Packing House, AFL-CIO, 425 F. 2d 281 (1st Cir. 1970) 7

F. F. Instrument Corp. v. Union de Tronquistas de Puerto Rico, 558 F. 2d 607 (1st Cir. 1977) 10, 16, 17

Gulf Coast Building & Construction Trades Council v. F. R. Hoar & Son, Inc., 370 F. 2d 746 (5th Cir. 1967) 9

Hall v. Cole, 412 U. S. 1, 13-14 (1973) 12, 13, 19

Henderson v. United Brotherhood of Carpenters and Joiners of America, Local 112, Civil Nos. 2235 and 2239 (D. Mont., Butte Division) 6

Linbeck Construction v. International Association of Bridge, etc., 547 F. 2d 948 (5th Cir. 1977) 9

Local 984 v. Humko Company, 287 F. 2d 231 (6th Cir. 1961), cert. denied 366 U. S. 962 9

Mason-Rust v. Laborers, Local 42, 435 F. 2d 939 (8th Cir. 1970) 9

Maxey v. Butchers' Union Local No. 126, 627 F. 2d 912 (9th Cir. 1980) 9, 14

Mead v. Retail Clerks International Association, 523 F. 2d 1371 (9th Cir. 1975) 8, 9, 14, 15

Mills v. Electric Auto-Lite, 396 U. S. 375, 396 (1970) 19

Noranda Aluminum, Inc. v. United Brotherhood of Carpenters and Joiners of America, AFL-CIO, 528 F. 2d 1304 (8th Cir. 1976) 18

TABLE OF AUTHORITIES—Continued

Page

Refrigeration Contractors, Inc. v. Plumbers & Pipefitters, Local 211, 501 F. 2d 668 (5th Cir. 1974) 9, 18

Robertson, H. L. & Associates, Inc. v. Plumbers, Local 519, 429 F. 2d 520 (5th Cir. 1970) 9

Rogers v. Local No. 8, American Federation of Musicians, etc., 403 F. Supp. 870 (E. D. Wis. 1975), aff'd. 544 F. 2d 519 18

Sheet Metal Workers International Association, Local Union No. 223, AFL-CIO v. Atlas Sheet Metal Company of Jacksonville, 384 F. 2d 101 (5th Cir. 1967) 9, 18, 19

Summit Valley Industries, Inc. v. Local 112, United Brotherhood of Carpenters and Joiners of America, 475 F. Supp. 665 (D. Mont. 1979) 2, 7

Summit Valley Industries, Inc. v. Local 112, United Brotherhood of Carpenters and Joiners of America, Cause No. 79-4663 (9th Cir. 1981, unpublished opinion) 2

Teamsters Local 20 v. Morton, 377 U. S. 252 (1964) 10

Texas Distributors v. Local Union, No. 100, etc., 598 F. 2d 393 (5th Cir. 1979) 9, 18

Tidee Products, 194 NLRB No. 198, 79 LRRM 1175, enf. 502 F. 2d 349 (1972) 14, 15

United Brotherhood of Carpenters and Joiners of America, Local 112 v. NLRB, Nos. 75-2064 and 75-2166 (9th Cir. 1979) 7

TABLE OF AUTHORITIES—Continued

Page

United Brotherhood of Carpenters and Joiners of America v. NLRB, 574 F. 2d 457 (9th Cir. 1978) 6, 7

STATUTES:

28 U. S. C. § 1254(1) 2

29 U. S. C. § 158, Section 8(b)(4), Labor-Management Relations Act of 1947 ..... 2, 3, 6, 14, 15

29 U. S. C. § 187, Section 303, Labor-Management Relations Act of 1947 ..... 2, 4, 9, 10, 15, 16, 20

29 U. S. C. § 187(b) 16

27-2-207, Montana Code Annotated (1978) 7

MISCELLANEOUS CITATIONS:

S. Rep. No. 105 on S. 1126, 80th Cong. 1st Sess (1947) 19, 20

Legislative History of the Labor Management Relations Act 1947, Vol. 1, Published by the National Labor Relations Board (U. S. Govt. Printing Office, 1948) 20

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LOCAL 112, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner, Summit Valley Industries, Inc., respectfully requests that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on June 5, 1981.

OPINIONS BELOW

The opinion of the Court of Appeals in *Summit Valley Industries, Inc. v. Local 112, United Brotherhood of Carpenters and Joiners of America,* Cause No. 79-4663 (9th Cir. 1981, unpublished opinion), appears as Appendix A. The opinion of the United States District Court for the District of Montana, *Summit Valley Industries, Inc. v. Local 112, United Brotherhood of Carpenters and Joiners of America,* 475 F. Supp. 665 (D. Mont. 1979), appears as Appendix B.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on June 5, 1981. A timely application for an extension of time within which to file this Petition was granted, extending the time to file this Petition to September 14, 1981. This Court's jurisdiction is invoked under 28 U. S. C. § 1254(1).

STATUTES INVOLVED

(1) Section 303 of the Labor-Management Relations Act of 1947 (29 U. S. C. § 187), which provides:

> "(a) It shall be unlawful, for the purpose of this section only, in an industry or activity affecting commerce, for any labor organization to engage in any activity or conduct defined as an unfair labor practice in section 158(b)(4) of this title.

"(b) Whoever shall be injured in his business or property by reason of any violation of subsection (a) of this section may sue therefor in any district court of the United States subject to the limitations and provisions of section 185 of this title without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit."

(2) Section 8(b)(4) of the Labor-Management Relations Act of 1947 (29 U. S. C. § 158 (b) (4)), which provides:

"(b) It shall be an unfair labor practice for a labor organization or its agents—

"• • •.

"(4) (i) to engage in, or induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle, or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

"• • •.

" (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: Provided, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

"• • •.

" (D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work. . . .
"• • •"

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STATEMENT OF THE CASE

The jurisdiction of the trial court below was invoked pursuant to Section 303 of the Labor-Management Relations Act of 1947, 29 U. S. C. § 187.

This action involves the protracted but successful efforts of a fledgling, technologically innovative business, Summit Valley Industries, Inc., Petitioner, to effect a permanent cessation of illegal secondary boycott and jurisdictional activities which were directed against it by Respondent Local 112, United Brotherhood of Carpenters and Joiners of America (Union).

The related litigation below spans a period of more than nine years, commencing shortly after the Petitioner opened its modular home plant in Butte, Montana, in June of 1972.[1] At that time, and continuing through October, 1972, the Union initiated a series of illegal acts intended to prevent Petitioner's introduction of modular, pre-built factory homes to the Butte area.[2] A principal

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[1]The decisions of the NLRB and courts are summarized and cited infra, p. 6-7.

[2]Appendix C, App. 9-10.

objection of the Union to those homes was the fact that they were constructed more efficiently than a conventional "stick-built" home, and therefore were less labor intensive.[3] The illegal conduct consisted of picketing and other coercive activities which were also designed to preempt jurisdiction over the work in Petitioner's plant, which was being performed by employees who were members of another union working under a collective bargaining agreement with the Petitioner.[4]

In addition, the Union engaged in illegal and coercive action against members of its own union who erected Petitioner's manufactured structures and performed other tasks necessary to make the modular homes habitable after Petitioner delivered them to customers' home sites.[5]

The Petitioner commenced litigation in October, 1972, for the purpose of obtaining a permanent cessation of the Union's illegal secondary and jurisdictional activities, and to obtain a permanent administrative and judicial prohibition against the Union from coercing its members to cease doing essential on-site work for the Petitioner's customers.

That litigation was commenced by the filing of unfair labor practice charges with the National Labor Relations

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[3]Appendix D, App. 20-25. Appendix D contains selected excerpts from a 49-page opinion of the Administrative Law Judge in proceedings before the National Labor Relations Board (NLRB).

[4]Appendix C, App. 9-10; Appendix D, App. 30.

[5]The Union fined its members, or threatened them with fines, if they performed work for Petitioner's customers. Appendix D, App. 36-37. Petitioner's customers were required to hire Union carpenters to build foundations and have other ancillary site work performed prior to shipment of the home from the factory. Appendix D, App. 23.

Board (NLRB) alleging violations of Section 8(b)(4)(B) [secondary boycott] and Section 8(b)(4)(D) [jurisdictional dispute] of the Labor-Management Relations Act (the Act).[6] Injunction proceedings were commenced in the United States District Court for the District of Montana under Section 10(l) of the Act which resulted in a preliminary injunction restraining the Union from its conduct during the pendency of the NLRB litigation.[7] The NLRB issued a decision favorable to the Petitioner on the jurisdictional dispute aspect of the case on April 6, 1973.[8] Thereafter, an administrative law judge, following fifteen days of hearings, issued a decision favorable to the Petitioner on the secondary boycott and jurisdictional dispute aspects of the case on May 9, 1974.[9] That decision was upheld by the NLRB on May 12, 1975.[10]

The Union appealed the decision of the NLRB to the Ninth Circuit, which upheld the Board's decision and granted the petitions of the Board for enforcement of its orders against the Union.[11] The Union continued to resist compliance with the orders entered against it, and contempt proceedings were initiated before the Ninth Circuit. Those proceedings were discontinued upon subsequent

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[6]Appendix C, App. 8-16; Appendix D, App. 17-37.

[7]*Henderson v. United Brotherhood of Carpenters and Joiners of America, Local 112*, Civil Nos. 2235 and 2239, (D. Mont., Butte Division).

[8]*Carpenters, Local 112 (Summit Valley Industries)*, 202 NLRB No. 153, 83 LRRM 1013 (1973); Appendix C.

[9]Appendix D.

[10]*Carpenters, Local 112 (Summit Valley Industries)*, 217 NLRB No. 129, 89 LRRM 1799 (1975).

[11]*United Brotherhood of Carpenters and Joiners, Local 112 v. NLRB*, 574 F. 2d 457 (9th Cir. 1978).

compliance by the Union with the provisions of the Board's order.[12]

This action to recover damages under Section 303 of the Act was commenced on September 25, 1974, while the proceedings before the NLRB were still pending.[13] The action was held in abeyance by order of the district court until the orders of the NLRB became final or were vacated. On July 19, 1978, following the Ninth Circuit's affirmance and enforcement of the NLRB decisions,[14] the district court collaterally estopped the Union from further adjudicating the issue of liability under Section 303 and granted summary judgment on liability issues in favor of the Petitioner.

On August 6, 1979, the issue of damages in this case was tried in the district court. The district court found that it was "necessary to the survival" of Petitioner "as a business to prevent the Defendant, Local 112, United Brotherhood of Carpenters and Joiners of America" from violating the secondary boycott and jurisdictional dispute sections of the Act.[15] The district court also found that

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[12]*United Brotherhood of Carpenters and Joiners of America, Local 112 v. NLRB,* Nos. 75-2064 and 75-2166 (9th Cir. 1979).

[13]It was necessary to file the Section 303 action at that time to avoid the running of the statute of limitations for commencing such an action. The limitations period for such an action is governed by the applicable state statute regarding tort actions for property damage, which is two years in Montana. See *DeArroyo v. DeTrabajadores Packing House, AFL-CIO,* 425 F. 2d 281 (1st Cir. 1970); Montana Code Annotated, § 27-2-207 (1978).

[14]*United Brotherhood of Carpenters and Joiners of America v. NLRB,* 574 F. 2d at 464.

[15]*Summit Valley Industries, Inc. v. Local 112, United Brotherhood of Carpenters and Joiners of America,* 475 F. Supp. 665 (D. Mont. 1979); Appendix B, App. 4.

by reason of "continued threats on the part of the Union, it was necessary to employ attorneys from the time of the commencement of the picketing" until this court denied certiorari,[16] which resulted in the Petitioner incurring legal fees and related costs in the amount of $13,604.33 "to stop the Union's violations of the Act."[17]

The district court held, however, that the Petitioner was not entitled to recover damages for attorney fees under Section 303 of the Act incurred in effecting a cessation of the Union's illegal activities and a resumption of the enterprise because of the Ninth Circuit's ruling in *Mead v. Retail Clerks Local 839*, 523 F. 2d 1371 (9th Cir. 1975), by which the district court concluded that "regardless of my own opinion, I am bound."[18]

The Petitioner appealed the district court's decision denying attorney fees to the Ninth Circuit Court of Appeals. That court, in a cursory and unpublished opinion, recognized and conceded "that other circuits hold a different view," but refused to reverse the district court's denial of attorney fees incurred in the Petitioner's efforts before the NLRB to halt the illegal activities.[19] From that decision, Summit Valley Industries petitions this Court for a writ of certiorari to issue to the United States Court of Appeals for the Ninth Circuit in cause numbered 79-4663.

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[16]*Chamber of Commerce of the United States v. NLRB*, 439 U. S. 981 (1978).

[17]Appendix B, App. 4.

[18]*Id.*, App. 5.

[19]Appendix A.

ARGUMENT

I. Reasons For Granting the Writ.

A. The Circuit Courts of Appeal Are Divided on the Question Presented.

The Ninth Circuit stands alone among the circuits in holding that attorney fees incurred to effect a cessation of illegal activities and resumption of work are not recoverable as damages under Section 303 of the Act.[20] The Fifth,[21] Sixth[22] and Eighth[23] Circuits adhere to a contrary rule, allowing recovery of fees under Section 303 which are incurred to terminate illegal activities and allow work to resume. The First Circuit appears to have straddled

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[20]*Mead v. Retail Clerks International Association*, 523 F. 2d 1371 (9th Cir. 1975); *Maxey v. Butchers Union Local No. 126*, 627 F. 2d 912 (9th Cir. 1980).

[21]*Sheet Metal Workers International Association, Local Union No. 223, AFL-CIO v. Atlas Sheet Metal Company of Jacksonville*, 384 F. 2d 101 (5th Cir. 1967); *Refrigeration Contractors, Inc. v. Plumbers & Pipefitters, Local 211*, 501 F. 2d 668 (5th Cir. 1974); *H. L. Robertson & Associates, Inc. v. Plumbers, Local 519*, 429 F. 2d 520 (5th Cir. 1970); *Gulf Coast Building & Construction Trades Council v. F. R. Hoar & Son, Inc.*, 370 F. 2d 746 (5th Cir. 1967); *Linbeck Construction v. International Association of Bridge, etc.*, 547 F. 2d 948 (5th Cir. 1977); *Texas Distributors v. Local Union, No. 100, etc.*, 598 F. 2d 393 (5th Cir. 1979); *Capeletti Brothers, Inc. v. Local 487*, 514 F. 2d 1239 (5th Cir. 1975).

[22]*Local 984 v. Humko Company*, 287 F. 2d 231 (6th Cir. 1961), cert. denied 366 U. S. 962.

[23]*Associated General Contractors of Minnesota v. Construction and General Laborers Local No. 563*, 612 F. 2d 1060 (8th Cir. 1979); *Mason-Rust v. Laborers, Local 42*, 435 F. 2d 939 (8th Cir. 1970); *Bryant Air Conditioning & Heating Company, Inc. v. Sheet Metal Workers International Association, Local No. 541*, 472 F. 2d 969 (8th Cir. 1973).

the two views.[24] There is, therefore, a clear division of authority in the United States on the issue presented here, which division places the Petitioner and other similarly situated enterprises in the Ninth Circuit outside the prevailing rule of law and the remedies afforded by it. The Ninth Circuit Court itself, in its opinion below, recognized the divergence of authority on the question, and acknowledged that it held a minority view. The Circuit Court made no attempt to reconcile its previous holdings with cases that have subsequently criticized those holdings.[25]

This is a case of first impression here. While this Court in 1964 held that punitive damages awarded under state law are not includable as "actual, compensatory damages" under Section 303, *Teamsters Local 20 v. Morton*, 377 U.S. 252, 260-261 (1964), this Court has not since ruled upon any other issues relating to the scope of that remedy provision of the Labor-Management Relations Act.

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[24]*F. F. Instrument Corp. v. Union de Tronquistas de Puerto Rico*, 558 F. 2d 607 (1st Cir. 1977). The First Circuit held that attorneys' fees in that case were not recoverable under Section 303 because the unfair labor practice proceedings had been commenced after the union had ceased the illegal picketing. However, the First Circuit indicated that under different circumstances it might allow recovery of attorneys' fees incurred in preceding NLRB litigation if they were "closely related to the illegality" and could be shown to have been incurred "directly in mitigation of harm," thereby making them a "component of the damages flowing from the prior wrong." 558 F. 2d at 611; see discussion, infra, at p. 16-20.

[25]See, e. g., *Associated General Contractors v. Construction and General Laborers, Local 563*, 612 F. 2d 1060 (8th Cir. 1979).

B. The Issue Presents This Court the Opportunity to Provide Victims of Illegal Secondary Boycotts an Effective Remedy by Which They May Vindicate Their Rights Guaranteed by Federal Labor Law and Secure Meaningful Protection of Those Rights.

The district court below expressly found that the activities of counsel in procuring a cessation of illegal activities and a resumption of work were "necessary to the survival" of the Petitioner as a business.[26] The Petitioner was a small, fledgling business engaged in the marketing of what was, at that time, a precarious and innovative technology—construction of complete, pre-built modular homes manufactured in a plant under controlled conditions. As is often the case for such businesses, the Petitioner's use of new production techniques, in this case to reduce housing costs for middle-income families, created new work opportunities for a certain group of employees represented by one union, but was perceived by a competing union to be a threat to its vested interest in maintaining more labor intensive and traditional means of producing the product.[27]

Petitioner's whole enterprise was confined to the situs of its dispute with the Union, and was therefore totally subject to the Union's illegal activities which terminated and interrupted Petitioner's ability to produce and market its product.[28] The Petitioner, then, like many other small businesses, was particularly vulnerable to illegal union activities designed to intimidate and coerce it, by illegal means, into acceding to union claims or demands.

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[26]Appendix B, App. 4.
[27]Appendix D, App. 20-25.
[28]Appendix D, App. 27-31.

The efforts of counsel in effecting a resumption of the enterprise may be vital to the ultimate success or failure of the fledgling business, and the costs of legal fees itself may be crucial in determining whether the small business accedes to union demands or seeks to vindicate its rights before judicial and administrative tribunals.[29] The basic policy of the secondary boycott provisions forbids a union from inducing employees to strike against or refuse to handle goods for their employer when an object is to force him or another person to cease doing business with some third person. *Carpenters Local 1976 v. NLRB*, 357 U. S. 93 (1958). That policy is frustrated by a rule of law which thrusts a victim of secondary activity, like the Petitioner, into a dilemma whereby it cannot survive if it takes no legal action, but if it does take action, one of the most significant losses incurred—counsel fees—is not recoverable.

If counsel fees incurred to end illegal activity and allow work to resume are not compensable under Section 303, illegal union activities directed against the small business will often continue because other compensatory damages, which are allowed,[30] are not, in many cases, sufficient in amount to justify the expense of litigation. See *Hall v. Cole*, 412 U. S. 1, 13-14 (1973). Federally guaranteed rights, therefore, are not vindicated and the union obtains

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[29]The point is graphically illustrated by the district court's finding of fact that Gene Spolar, the principal officer and owner of Petitioner corporation, was paid $2,000 per month for 60 hours' work per week. Appendix B, App. 4-5. It is a fair inference that the profit margin of such a business was narrow enough that counsel fees in the approximate amount of $14,000.00, and related expenses incurred to stop the illegal activities, could seriously jeopardize the basic profitability and continuance of the enterprise.

[30]See discussion, p. 18-19, *infra*.

an unfair advantage because it may effectively engage in illegal self-help activity, while the employer faces an additional financial burden that may make it impossible to seek the relief available under federal labor laws.

Moreover, because of the inherent difficulty in proving other monetary losses caused by an illegal boycott activity (e. g., the loss of customers who were persuaded by illegal picketing from purchasing the boycotted products[31]), the unions in the Ninth Circuit are allowed in such cases to engage in illegal activity with near impunity since they are not required to indemnify their victims for their legal fees and related litigation expenses, which are likely to be, as here, the most substantial and quantifiable loss. The unfortunate employer in such cases must face substantial start-up costs in the form of legal expenses simply to protect his right to enter the marketplace.[32]

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[31]The principal owner and manager of the Petitioner firm, describing the effects of the illegal picketing, stated:

> "A: (By Mr. Spolar) We wouldn't have had no business . . . (w)e would have had no customers to buy our product because nobody would cross that picket line to buy a house from us.
>
> "Q: Is that based upon your experience in observing the response (by) the public to picket lines in Butte, Montana?
>
> "A: It was my experience when we had the pickets. . . ."
>
> (Transcript, p. 29).

[32]The rationale for allowing attorneys' fees in the context of the instant case is consistent with the justification for awarding such fees articulated in *Hall v. Cole*, 412 U. S. at 13-14, in which this Court stated that granting such fees in a suit to vindicate free speech rights of union members should not be "diminished by the unescapable fact" that the aggrieved party may often be limited in his ability to finance litigation that insures meaningful protection for the litigant and others whose rights he has helped guarantee.

The motivation for a union to continue its illegal conduct, even after the illegality is adjudicated at initial stages of the proceedings, is exemplified in this case. The Ninth Circuit expressly noted in the enforcement proceedings that the Respondent Union threatened to continue picketing even after the NLRB had made its initial determination against the Union in the Section 10(k) (jurisdictional dispute) proceedings:

> "To resolve this conflict, the Board entered a Section 10(k) award giving the work to the Teamsters. But, after the award, the union *threatened to continue picketing the site to enforce the claim rejected in the Section 10(k) award.* In its initial acts against Summit *and its further threats against the manufacturers,* the union clearly violated Section 8(b)(4)(D) as found by the Board."
>
> 574 F. 2d 457, at 463; emphasis supplied.

In denying recovery of attorney fees under Section 303, the Ninth Circuit, in *Mead v. Retail Clerks International Association,* 523 F. 2d at 158, and *Maxey v. Butchers Union Local No. 126,* 627 F. 2d at 916, contemplated that allowing compensation for attorney fees was an impermissible intrusion upon the NLRB's rule allowing them *only* where the union's defense is "frivolous or in bad faith." *Tidee Products,* 194 NLRB No. 198, 79 LRRM 1175, enf. 502 F. 2d 349 (1972). That rationale is seriously misplaced.[33] If taken to its conclusion, the federal courts

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[33]The so-called "American rule," which is another basis for the Ninth Circuit's holding, typically allows for the recovery of attorney fees only in situations where they are provided by statute or by contract of the parties. *Alyeska Pipeline Service Company v. The Wilderness Society,* 421 U. S. 240 (1975). That

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would be required to defer to the NLRB's interpretations of permissible damages under Section 303, because not to do so would circumvent the "Board's exercise of its 'broad discretion,' . . . to take such affirmative action . . . as will effectuate the policies of [the Act]." *Mead v. Retail Clerks International Association*, 523 F. 2d at 1381. Congress has entrusted the courts, not the Board, with the authority to apply Section 303 and determine what elements of damages are awardable consistent with it.[34] The First Circuit

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(Continued from previous page)

rule, however, does not apply under Section 303 for several reasons: First, and most obviously, the attorneys' fees for which recovery is sought are not fees incurred in prosecuting the damages action itself, but only those incurred in preceding litigation in obtaining a resumption of the *status quo*. Furthermore, the courts which grant fees as damages under Section 303 have held that the award of attorneys' fees arises by right of the statute itself. Further, the American rule, because it is based upon a rationale that losing litigants were being "unfairly saddled with exorbitant fees for the victor's attorney." *Id.*, at 252, is inapplicable since it is in the employer's interest to effect a cessation of the unlawful activities and resume work as rapidly as possible. It therefore has no incentive to compound attorneys' fees and charge them against the union.

[34]For a good discussion of the limitations imposed upon the NLRB in awarding attorneys' fees, see the lengthy asterisked footnote of Judge McKinnon, author of the majority opinion in *Tidee Products*, 502 F. 2d at 352-353. The occasions in which the Board will consider awarding attorneys' fees are extremely infrequent and are limited to extraordinary situations. Indeed, as the Ninth Circuit recognized in *Mead, supra*, attorneys' fees are awarded by the Board only where the defense is "frivolous or in bad faith." 523 F. 2d at 1381. The reasoning of the Ninth Circuit becomes faulty, however, when it suggests that Section 303 could be used to circumvent the Board's rule. Section 303 is not designed to award *any* damages, let alone attorneys' fees, to any party for violations of Sections 8 (a) or 8 (b) of the Act, other than the secondary boycott provisions of 8 (b) (4).

perceived that distinction in *F. F. Instrument Corp. v. Union de Tronquistas*, 558 F. 2d at 611, when it noted that "The Board may sometimes choose to award attorney's fees in such circumstances, *but this is a separate matter*" (emphasis supplied).

The Ninth Circuit's rule not only creates a severe impediment to the vindication of a small employer's rights, but is also founded upon a rationale which, if left unchecked, would seriously undermine the specific Congressional directive that only the federal district courts are to fashion remedies under Section 303 of the Act.

C. The 9th Circuit Rule Conflicts with the Purpose and Language of Section 303.

Section 303 provides that "(w)ho ever shall be injured in his business or property [by reason of any violation of the secondary boycott provisions of Section 8(b)(4)], . . . shall recover the damages by him sustained and the cost of suit." 29 U. S. C. §187(b). The Eighth Circuit's decision in *Associated General Contractors v. Construction and General Laborers, Local 563*, 612 F. 2d at 1063-1064 (8th Cir. 1979), expresses with clarity the reasons why attorneys' fees are properly includable as compensatory damages under Section 303:

> "The attorneys' fee demand here is predicated on the recovery of compensatory damages from an earlier, terminated violation, as provided by Section 303(b), not on a theory of recovery for attorneys' fees incurred in a suit brought as a 'private attorney general' or otherwise. . . . What is sought here is *not* an 'award' of attorneys' fees *in the case at hand*, but that part of [plaintiff's] compensatory damages consisting of the attorneys' fees it incurred in achieving resumption of work. [Citation omitted].

> "Reasonable attorneys' fees incurred in effecting resumption of work in effect take the place of other compensable damages which would continue to be suffered if work were not resumed. Aimed at mitigating the losses resulting from a work stoppage, and at preserving the enterprise, they are analogous to costs of subcontracting and overtime. They are within the purview of Section 303(b) as other courts have held."
>
> (Emphasis supplied).

Similarly, in *F. F. Instrument Corporation v. Union de Tronquistas de Puerto Rico*, 558 F. 2d at 611, the First Circuit analyzed the decisions of the other circuit courts allowing the recovery of attorney fees "incurred in removing an illegal picket line or otherwise directly in mitigation of harm" and indicated that the statute permitted those fees because attorneys' fees in that situation are "closely related to the illegality," and they would, therefore, be recoverable as *compensatory* damages under Section 303. The court distinguished the situation where attorney fees are incurred chiefly in "continuing struggles" with the union, in which case they become "too remote to be regarded as damages for the prior wrong." Hence, the First Circuit indicated that fees incurred to effect a cessation of illegal activities and resumption of work would be recoverable, but those incurred in unfair labor practice proceedings which take place after the illegal conduct has been terminated, or in prosecuting the Section 303 action itself, are not recoverable. *Id.*, at 610-611. Petitioner also recognizes that distinction, and therefore seeks *only* fees incurred in litigation before the NLRB and the courts to terminate the illegal activities, enforce the decisions of those tribunals, and allow the business to resume

its operations without being subjected to harassing, illegal boycott activity.[35]

The analysis of the First, Fifth, Sixth and Eighth Circuits is consistent with the essential purpose of the statute, which is to provide *compensatory* damages to the employer *caused* by the illegal activities. See *Noranda Aluminum, Inc. v. United Brotherhood of Carpenters and Joiners of America, AFL-CIO*, 528 F. 2d at 1309. Attorneys' fees incurred to obtain a cessation of illegal activities and a resumption of work are compensatory under Section 303 because they are "directly related to or caused by" the unlawful activity. *Sheet Metal Workers International Association, Local 223 v. Atlas Sheet Metal*, 384 F. 2d at 110.

Indeed, other elements of damages which are routinely awarded as compensatory damages under Section 303 are plainly analogous to attorney fees directly related to restoring the *status quo*. E. g., *Refrigeration Contractors, Inc. v. Local Union No. 211, etc.*, 501 F. 2d at 671 (wages paid to employees who were rendered unproductive by illegal union activities); *Noranda Aluminum, Inc. v. United Brotherhood of Carpenters and Joiners of America, AFL-CIO*, 528 F. 2d 1304, 1309 (8th Cir. 1976) (rental and depreciation costs, delay costs, and increased overtime costs); *Rogers v. Local No. 8, American Federation of Musicians, etc.*, 403 F. Supp. 870, 873 (E. D. Wis. 1975),

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[35]See *Texas Distributors, Inc. v. Local 100, Plumbers*, 598 F. 2d 393, 401 (5th Cir. 1979): ". . . where an employer has a § 8 (b) (4) claim and another claim [Sec. 303] as well and it proceeds before the NLRB on the other claim as the best means to effectuate the resumption of work, the employer is entitled to recover reasonable attorney's fees."

aff'd. 544 F. 2d 519 (lost business opportunities); *Sheet Metal Workers International Association, Local 223 v. Atlas Sheet Metal,* 384 F. 2d at 110 (subcontracting costs). Thus, the Ninth Circuit's rule creates the anomalous situation in which the costs of subcontracting for security guards to protect the property against the acts of illegal picketers would be compensable, but the costs of employing attorneys to obtain a cessation of the illegal picketing are not compensable.

Because they mitigate the losses resulting from a work stoppage, attorney fees incurred to procure a resumption of work also inure to the benefit of both the union and the injured enterprise. *Associated General Contractors v. Local 563,* 612 F. 2d at 1064. Therefore, the decisions of the majority of the circuits not only provide a meaningful underpinning to support the basic policy purposes of Section 303, but also grant protection to the union and its membership by saving them from the exposure to far greater financial liability to which they would be subjected if illegal secondary boycott activities are allowed to continue and thereby achieve their purpose of causing greater injury. See *Hall v. Cole,* 412 U. S. at 5-7; *Mills v. Electric Auto-Lite,* 396 U. S. 375, 396 (1970).

The allowance of attorneys' fees incurred by injured neutrals to obtain a cessation of the illegal activity would tend to curb the useless waste of financial and human resources that occur for all parties—the employer and its employees and the union and its members—when union leaders deliberately engage in activity that they know, or strongly suspect, is illegal and injurious to neutral parties. The Congress, 34 years ago, recognized the devastating impact of the secondary boycott and enacted strong

statutory prohibitions against it. See S. Rep. No. 105 on S. 1126, 80th Cong. 1st Sess. (1947).[36] Unfortunately, however, it remains all too apparent that there continue to be victims of such activity who are in need of a more complete articulation of the remedies available when injuries are sustained as a result of boycotts which Congress has so forcefully condemned. A rule of federal labor law that would allow, as compensatory damages under Section 303, indemnification of an injured person's attorneys' fees and related expenses of litigation incurred in successfully effecting a cessation of the boycott and a resumption of the enterprise, would not only provide for effective vindication of federally protected rights, but would also erect another clear and meaningful signal that our legal system continues to strongly condemn secondary boycotts and their injurious consequences.

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[36]Senator Taft, in that portion of the Senate Report justifying the inclusion of Section 303, wrote:

> "There appears to be virtually no disagreement as to the complete injustice of secondary boycotts and jurisdictional strikes or as to the necessity of giving injured third parties a remedy against their operation. For the most part, it is the small employer, often with less than 50 employees, and the farmer or farm trucker who are the main victims of this type of . . . union activity. * * * (T)he power of labor unions is being used indiscriminately against the small business man, and he is quickly forced to capitulate by danger of bankruptcy. The amendment [Sec. 303] proposes that he be entitled to file a suit for damages. . . . (for such activity)".
>
> *Legislative History of the Labor Management Relations Act of 1947*, Vol. 1, Published by the National Labor Relations Board (U. S. Govt. Printing Office, 1948), at p. 460.

CONCLUSION

For all of the reasons stated in this petition, a writ of certiorari should issue to review the judgment of the Ninth Circuit (Cause No. 79-4663).

RESPECTFULLY SUBMITTED this 10th day of September, 1981.

DONALD C. ROBINSON
Poore, Roth, Robischon & Robinson, P.C.

1341 Harrison Avenue
Butte, Montana 59701
Telephone: (406) 782-1223

Attorneys for the Petitioner

Appendix

APPENDICES

A—Ninth Circuit Court Opinion, *Summit Valley Industries, Inc. v. Local 112, United Brotherhood of Carpenters and Joiners of America*, Cause No. 79-4663 (9th Cir. 1981, unpublished opinion).

B—District Court Opinion, *Summit Valley Industries, Inc. v. Local 112, United Brotherhood of Carpenters and Joiners of America*, 475 F. Supp. 665 (D. Mont. 1979).

C—Opinion, National Labor Relations Board, *Carpenters, Local 112 (Summit Valley Industries)*, 202 NLRB No. 153, 83 LRRM 1013 (1973).

D—Excerpts of Decision of Administrative Law Judge, National Labor Relations Board (1974, unpublished decision).

APPENDIX A

DO NOT PUBLISH

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SUMMIT VALLEY INDUSTRIES, INC., a Montana corporation, *Plaintiff-Appellant,* vs. LOCAL 112, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, *Defendants-Appellees.*	No. 79-4663
SUMMIT VALLEY INDUSTRIES, INC., a Montana corporation, *Plaintiff-Appellee,* vs. LOCAL 112, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA and JAMES CADIGAN, its Agent, *Defendant-Appellant.*	No. 79-4673 MEMORANDUM

Argued and Submitted—May 8, 1981

Decided—June 5, 1981

Appeal from the United States District Court
for the District of Montana
Russell E. Smith, District Judge, Presiding

Before: GOODWIN and KENNEDY, Circuit Judges, and WATERS,* District Judge.

*The Honorable Laughlin E. Waters, United States District Judge for the Central District of California, sitting by designation.

Summit Valley Industries, Inc. (Summit Valley) brought this suit under Section 303 of the Labor-Management Relations Act, 29 U. S. C. § 187, for damages sustained as a result of Local 112's secondary activities. Summit Valley contends that the district court erred by refusing to award reimbursement for attorney's fees incurred by it in an unfair labor practice proceeding before the National Labor Relations Board (NLRB). Summit Valley contends that legal fees incurred before the NLRB to secure a cessation of illegal secondary activities are a proper element of damages under Section 303. We recogize that other Circuits hold a different view, *Associated General Contractors of Minnesota v. Construction and General Laborers Local No. 563*, 612 F. 2d 1060 (8th Cir. 1979); *Texas Distributors, Inc., v. Local Union No. 100*, 598 F. 2d 393 (5th Cir. 1979); *F. F. Instrument Corp. v. Union de Tronquistas de Puerto Rico*, 558 F. 2d 607 (1st Cir. 1977); *Local Union No. 984, International Brotherhood of Teamsters v. Humko Co.*, 287 F. 2d 231 (6th Cir.), *cert. denied*, 366 U. S. 962 (1961), but this Circuit has held that damages under Section 303 do not include reimbursement for attorney's fees incurred before the NLRB. *Mead v. Retail Clerks International Association*, 523 F. 2d 1371 (9th Cir. 1975); *Maxey v. Butchers' Union Local No. 126*, 627 F. 2d 912 (9th Cir. 1980). We are bound by the authority of this Circuit and Summit Valley's appeal is, therefore, without merit.

Local 112 cross-appeals from the judgment and contends that the district court should not have awarded Summit Valley $1,176 in damages. The district court's award is adequately supported in the record.

Affirmed.

APPENDIX B

SUMMIT VALLEY, ETC. v. LOCAL 112, UNITED BROTH. 665
Cite as 475 F. Supp. 665 (1979)

SUMMIT VALLEY INDUSTRIES, INC.,
a Montana Corporation, Plaintiff,

v.

LOCAL 112, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA,
Defendant.

No. CV 74-121-BU.

United States District Court,
D. Montana,
Butte Division.
Aug. 27, 1979.

In a proceeding relating to the recovery of attorneys' fees, the District Court, Russell E. Smith, J., held that employer could not recover attorneys' fees incurred in obtaining injunction against union's illegal activities but could recover damages based on time lost by plant manager.

Order accordingly.

• • •

(headnotes omitted)

Donald C. Robinson, Poore, McKenzie, Roth, Robischon & Robinson, Butte, Mont., for plaintiff.

Paul T. Bailey, Portland, Or., Robert J. Holland, Butte, Mont., for defendant.

FINDINGS OF FACT

I.

RUSSELL E. SMITH, District Judge.

It was necessary to the survival of Summit Valley Industries, Inc. (Summit Valley) as a business to prevent the defendant, Local 112, United Brotherhood of Carpenters and Joiners of America (Union), from violating §§ 8 (b)(4)(B) and 8(b)(4)(D) of the Act (29 U. S. C. §158(b)(4)(B) and (b)(4)(D)). To that end, by reason of continued threats on the part of the Union, it was necessary to employ attorneys from the time of the commencement of the picketing until the time of the denial of certiorari by the Supreme Court of the United States.

II.

The firm of Poore, Roth, Robischon & Robinson, P.C., was employed by the plaintiff to stop the Union's violations of the Act. The reasonable value of the legal services rendered for this purpose and during the time described in Paragraph I, and the amount for which plaintiff became obligated, was the sum of $12,584.65. The amount of costs incurred was $1,019.68. The total obligation of plaintiff for such legal fees and costs was the amount of $13,604.33.

III.

Of necessity, the plaintiff's plant manager, Eugene Spolar (Spolar), participated in all of the proceedings leading to the issuance of an injunction. The time spent was 147 hours. He was at the time being compensated at the rate of $2,000.00 per month and worked approximately

60 hours per week. His hourly rate was about $8.00. The cost of the services lost by plaintiff was the sum of $1,176.00.

CONCLUSIONS OF LAW

[1] I conclude that the plaintiff is not entitled to recover damages for attorneys' fees. I base this conclusion on the case of *Mead v. Retail Clerks Local 839,* 523 F. 2d 1371 (9th Cir. 1975), by which, regardless of my own opinion, I am bound. The court in that case, noting that there were contrary decisions, held that the attorneys' fees incurred in proceedings before the NLRB were not recoverable under the Labor Management Relations Act, 1947, § 303, 29 U. S. C. § 187. Plaintiff seeks to distinguish the *Mead* case on the ground that the illegal activity in *Mead* had ceased before the NLRB proceeding was filed. That fact, if it is a fact, is not apparent from the decision, and, in any event, was not stated to be a reason for the result reached. *Mead* appears to me to be grounded in the policies expressed in *Alyeska Pipeline Service Co. v. Wilderness Society,* 421 U. S. 240, 95 S. Ct. 1612, 44 L. Ed. 2d 141 (1975), reinforced by a desirability in labor relations cases of deferring to the power of the NLRB to fix attorneys' fees as a part of its duty to effectuate the policies of the Act. I am aware that in the case of *Sillman v. Teamsters Local 386,* 535 F. 2d 1172 (9th Cir. 1976), the Court of Appeals for the Ninth Circuit did affirm a district court judgment which included an award for attorneys' fees incurred in the related unfair labor practice proceedings. What happened in *Sillman* was that the appellant union in its brief filed July 3, 1974, in apparent reliance on *Sheet Metal Workers Local 223 v. Atlas Sheet Metal Co.,* 384 F.

2d 101 (5th Cir. 1967), which it cited, did not specify the award of attorneys' fees by the district court as error. The decision in *Mead*, which expressly disavowed *Sheet Metal Workers*, was not decided until October 1975. In *Sillman* the point decided by *Mead* was not raised by specification of error and was, by virtue of *Sheet Metal Workers*, virtually conceded. *Mead* was not mentioned in either the briefs or the opinion and in my opinion cannot be said to have been overruled or distinguished by *Sillman*.

The plaintiff's claim for damages, based upon a loss of Spolar's time, is troublesome. The defendant's unlawful activity did require NLRB proceedings, which in turn caused Spolar to absent himself from his usual supervisory activities. The company did lose Spolar's time. It may be noted here that Spolar, who was uncontradicted, said that the loss of his time did cause a loss of production. In somewhat similar circumstances courts have allowed as damages the salaries of employees rendered unproductive by reason of illegal union activity. *See Refrigeration Contractors, Inc. v. Local 211, United Association of Journeymen*, 501 F. 2d 668 (5th Cir. 1974); *Abbott v. Local 142, United Associations of Journeymen*, 429 F. 2d 786 (5th Cir. 1970); *Sheet Metal Workers Local 223 v. Atlas Sheet Metal Co.*, 384 F. 2d 101 (5th Cir. 1967); *Mason-Rust v. Laborers Local 42*, 306 F. Supp. 934 (E. D. Mo. 1969); *aff'd*, 435 F. 2d 939 (8th Cir. 1970); *Wells v. International Union of Operating Engineers, Local 181*, 206 F. Supp. 414 (W. D. Ky. 1962).

There is some language in the decisions which seems to equate attorneys' fees with other expenses of litigation. Thus, in *Mead v. Retail Clerks Local 839*, 523 F. 2d 1371 (9th Cir. 1975), it was said at 1380:

> Expenses of prior litigation, including attorneys' fees, may be recovered where, because of a defendant's wrongful conduct, the plaintiff was forced to prosecute or defend an action involving a third party;

and, at 1381:

> The Board recently reasserted its adherence to this general rule but held that the charged party may be required to reimburse the charging party's expenditure for attorneys' fees and other costs of litigation if the charged party's defense before the Board is frivolous or in bad faith. . . . It is for the Board, not the courts, to determine whether the conflicting interests are best resolved by imposing litigation costs upon the defeated party before the Board.

[2] Despite the quoted langauge, it is my opinion that damages may be awarded here for Spolar's lost time. Section 303(b) provides that a successful plaintiff "shall recover the damages by him sustained and the cost of the suit." The loss of Spolar's time, for which plaintiff paid, is, after all, a "damage sustained," and the damage is sustained because of defendant's illegal conduct. In a sense, the loss of Spolar's time is one of the costs of the litigation, but it is nonetheless a damage sustained. I do not think that *Mead,* in disallowing attorneys' fees, logically compels a decision that the claim for Spolar's time should be disallowed. Attorneys' fees are generally disallowed, and allowance is the exception; but the rule as to attorneys' fees is well-articulated and so generally used as to be called the "American Rule." History may justify the decision in *Mead,* but there is no uniform rule as to other litigation costs. The loss of an employee's time because of litigation is a damage. There is no history so clear that such damage should not be allowed because it could also be classified as a cost of litigation.

APPENDIX C

CARPENTERS, LOCAL 112 83 LRRM 1013

CARPENTERS, LOCAL 112—
(Summit Valley Industries)

Decision of NLRB

UNITED BROTHERHOOD OF CARPENTERS & JOINERS OF AMERICA, LOCAL 112, AFL-CIO, Butte, Mont. and SUMMIT VALLEY INDUSTRIES, INC. and BUTTE TEAMSTERS UNION, LOCAL NO. 2, a/w INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFERS, WAREHOUSEMEN AND HELPERS OF AMERICA, Case No. 19-CD-212, April 6, 1973, 202 NLRB No. 153

Before Fanning, Kennedy, and Penello, Members.

• • •

(headnotes omitted)

[*Text*] The work in dispute consists of the manufacture or building of pre-built or modular homes and other structures, including work at the intended sites of said structures necessary to make the structures habitable, to the extent all such work is claimed by Carpenters pursuant to its collective-bargaining agreement with the Silver Bow Employers' Association and Butte Contractors' Association, herein called Silver Bow and BCA, respectively.

• • •

The Employer manufactures modular homes at its plant and sells the finished product to realtors or ultimate users who in turn contract independently with other firms for the laying of the foundations on which the modular homes will be installed at the jobsite. The user can also

arrange to have a garage built and attached to his house. One of the firms that specialize in foundation laying and garage building is Jovick Construction, Inc., herein called Jovick. Jovick has been so utilized by some of the Employer's customers. Jovick is affiliated with BCA which in turn has entered into a collective-bargaining agreement with Carpenters, article XXII of which provides *inter alia* that, for any given work project, a certain designated minimum amount of work has to be done at the jobsite by workmen represented by Carpenters if not done at the company-signatory's shop. At the time of the hearing the Employer's complement of employees was approximately four, although the number has been as high as 20.

In mid-September 1972, the Employer and Teamsters entered into a collective bargaining agreement, effective June 12, 1972, which provided that employees represented by Teamsters would perform all in-plant manufacture and assembly work and all related on-site preparation.

On or about October 3, 1972, Leo Calcaterra, an employee of Jovick and a member of Carpenters, was putting the shingles on the roof of a garage attached to a modular home built by the Employer and already delivered on site. Upon hearing of this, James Cadigan, business representative of Carpenters, came on the scene and ordered Calcaterra off the job, advising him that the house he was working on was "unfair." Calcaterra complied with the request and notified Frank Jovick, coowner of Jovick Construction, Inc.,[3] as to what happened. The

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[3]The corporation is owned and operated by Frank Jovick and his wife.

next day, Jovick met Cadigan and asked why his man was pulled off the job. Cadigan told him that his work of putting the garage on the Employer's prefabricated modular home violated the BCA-Carpenters contract. Pursuant to advice from his attorney, Frank Jovick completed work on the garage himself, all of Jovick's employees having abided by Cadigan's order to refuse to work on modular homes.

Faced with an inability of Jovick to complete his on-site work, the Employer's customers, on two occasions, requested that the Employer complete the work itself, which it did. After the Employer started assigning its own men, represented by Teamsters, to finish the necessary on-site work, Carpenters began picketing the Employer's plant. On October 11, the picketing began, manifested by the carying of a picket sign by one person, the fastening of the picket sign to the fender of a car parked near the entrance to the Employer's plant, or the leaning of the sign against a nearby telephone pole. The picket sign read "NOTICE TO PUBLIC, This Employer *did not* employ members of Carpenter's Union in the work to be performed on this building—Local 112, Carpenters Union AFL-CIO,"—"this building" referring to a model prefabricated home situated on the premises near the sign. The picketing continued on October 12, 13, 18, 19, and 24 and November 7, 1972. The Employer sought, and on November 8 obtained, a temporary restraining order pursuant to Section 10 (1) of the Act from the United States District Court for the District of Montana. Since, that time, Jovick's employees have returned to work preparing the homesites for the employer's houses; and picketing has ceased. • • •

Carpenters contends that there is no reasonable cause to believe that Section 8(b)(4)(D) has been violated. It does not claim the in-plant work performed by the Employer's employees. The only dispute Carpenters has is with Jovick, which, as an affiliate of BCA, was bound by article XXII of the Carpenters-BCA agreement guaranteeing employees of Jovick a certain minimum amount of work at each construction site.[5] The validity of this ar-

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[5]Sec. 3A of art. XXII reads in relevant part as follows:

All of the following work shall be performed at the site of construction, alteration, or repairing of the building structure or other work and shall not be subcontracted off the job site, unless said work is done at the Employer's shop.

(1) All the erection of the forms for basements and/or footings for the structures. Nothing herein shall be construed to apply to prebuilt forms which have, through past practice, been utilized by the Employers.

(2) The installation of all exterior siding or finishing, or, in the alternative, all wallboards and/or paneling.

(3) The installation of exterior trim on the structure, or, in the alternative, all interior trim on the structure.

(4) The installation of all interior doors on the structure.

(5) The shingling of all roofs, whether wood, metal or composition materials.

(6) Installation of all cabinets and shelving.

(7) The cutting and installation of all wooden stairs and/or bannisters.

(8) The installation of all form work for steps and/or stoops. . . .

(9) The placing and fastening of all components of the structure upon the foundation.

ticle has been upheld by the Board.[6] By merely digging the foundation for, and/or attaching garage to, the Employer's prefabricated houses, Jovick was performing less than minimum work article XXII, section 3A, called for and hence was in violation of its contract with Carpenters. Any pressure exerted against Jovick, regardless of its incidental impact on the Employer, was for the sole purpose of urging Jovick to comply with the terms of that agreement, i. e., assign Carpenters the work set forth in article XXII, section 3A, even if it meant tearing down some of the prefabricated work and doing it again. No pressure was purposely directed at the Employer to change his work assignment.[7]

As for the picketing of the Employer, Carpenters contends it was of a purely informational nature, without any indication of threats, coercion, or interference. It took place on seemingly public land and the picket signs were truthful. Thus, such informational picketing, argues Carpenters, was protected activity.

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[6]United Brotherhood of Carpenters and Joiners of America, Local 112, AFL-CIO and Silver Bow Employers' Association and Butte Contractors' Association, 200 NLRB No. 42, 82 LRRM 1189. In this case, it was alleged that art. XXII amounted to a "hot cargo" clause violative of Sec. 8 (e) of the Act, and that the striking and other coercive activities, engaged in by Carpenters to secure such a clause in its contract with the two Contractor Associations, violated Sec. 8 (b) (4) (A). The Board however found such activity to be of a lawful primary nature, and art. XXII to be a lawful work preservation provision.

[7]Cadigan specifically denied vowing to "break" the Employer or manufacturer like the Employer. Cadigan also denied telling Jovick that his employees would return to work if Employer signed art. XXII.

Applicability of the Statute

Before the Board may proceed with a determination of dispute pursuant to Section 10(k) of the Act, it must be satisfied that there is reasonable cause to believe that Section 8(b)(4)(D) has been violated. Viewing the total circumstances of this case, we find that Carpenters conduct went beyond merely attempting to enforce article XXII, section 3A, against Jovick. By pulling Jovick's employees off the jobsite and threatening to picket the Employer's workmen if they followed their work to the jobsite and completed the work thereon, Carpenters for all intents and purposes was preventing the Employer from delivering its product to its customers in salable condition. Only if the Employer drastically curtailed its in-plant operations and delivered the components of each modular house to the jobsite so that Carpenters would then do the work guaranteed by article XXII, section 3A, in other words reassign its plant work from Teamsters to Carpenters, would the Carpenters remove pressure from the Employer and its subcontractor Jovick.

Corroborative of Carpenters unlawful objective is the evidence of a more direct pressure placed on the Employer by Carpenters. The record clearly shows that Carpenters picketed the Employer's plant for the express purpose of effecting a re-assignment of the prefabrication of the modular houses from workmen represented by Teamsters to workmen represented by Carpenters, either on the jobsite or in the plant. Cadigan in fact admitted that the picketing would have ceased had the in-plant work been given to members of Carpenters. Furthermore, Cadigan testified that additional picketing and handbilling would

take place if Teamsters insisted on following the work to the jobsite. From these circumstances, we find there is reasonable cause to believe that a violation of Section 8 (b)(4)(D) has occurred, and that the dispute is properly before the Board for determination.

Merits of the Dispute

Section 10(k) of the Act requires that the Board make an affirmative award of the disputed work after giving due consideration to various relevant factors.

1. *Certification and collective-bargaining agreements:* The collective-bargaining agreement in effect between the Employer and Teamsters clearly provides for an assignment of the work in question to employees represented by Teamsters. There is no collective-bargaining agreement in effect between the Employer and Carpenters. We thus concluded that the Employer's contract clearly favors assignment of the work in dispute to employees represented by Teamsters.

2. *Employer and area practice:* The Employer has not been in business long enough to establish an "Employer practice." The record reveals, however, that employees represented by other Teamsters locals have performed prefabrication work at five of six modular homes manufacturing plants throughout the country. There is one other modular builder in Montana, which has a contract with another Teamsters local. There is also evidence that two modular home builders, both outside Montana, have collective-bargaining agreements with the International Brotherhood of Carpenters. The weight of evidence as to area practice favors the Employer's present assignment.

3. *Skills, efficiency, and economy of operation:* Neither union makes the claim that its members possess superior skills to perform the disputed work. In fact, as the bulk of the workers newly hired by Employer were inexperienced in modular home fabrication, and as only 1 to 3 weeks on-the-job training is deemed necessary by the Employer, it appears that the work in dispute does not call for any skills peculiar to either Carpenters or Teamsters. With respect to efficiency and economy of operations, neither union has introduced evidence tending to favor an assignment to its respective members.

In view of the foregoing, we find that the factors of skill, efficiency, and economy of operation favor neither the Employer's assignment nor an assignment of the dispute work to workmen represented by Carpenters.

Conclusions

Having considered all pertinent factors present herein, we conclude that employees who are represented by Teamsters are entitled to perform the work in dispute. This assignment is consistent with collective-bargaining agreements and area practice. In making this determination, we are awarding the work in question to employees represented by Teamsters, but not to that Union or its members. The present determination is limited to the particular controversy which gave rise to this proceeding.

Determination of dispute: Employer's employees represented by Teamsters Local 2 are entitled to the work of manufacturing or building of prebuilt or modular homes and other structures, including work necessary to make structures habitable, to extent that all such work is claimed

by Carpenters Local 112 pursuant to its collective-bargaining agreement with Silver Bow Employers' Assn. and Butte Contractors' Assn. Carpenters Local 112 is not entitled by unlawful means to force or require employer to assign this work to members of Local 112 or employees represented by Local 112. Within 10 days from date of decision, Carpenters Local 112, shall notify regional director in writing whether it will abide by this determination.

APPENDIX D

This Appendix is comprised of excerpts of the Opinion of Admistrative Law Judge Louis S. Penfield which was issued May 9, 1974. The Opinion contained Judge Penfield's findings and conclusions on the unfair labor practice charges filed by various parties, including Summit Valley Industries, arising out of the transactions which were also the basis of Summit Valley's subsequent Section 303 damages action in the courts below. The excerpts are provided in the interest of providing this Court a more complete perspective on the nature of the underlying dispute between the parties here. (Page numbers of the decision from which excerpts are printed are noted).

JD-(SF)-74-74
Butte, Montana

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
BRANCH OFFICE
SAN FRANCISCO, CALIFORNIA

UNITED BROTHERHOOD OF CARPENTERS & JOINERS OF AMERICA, LOCAL 112, AFL-CIO AND ITS AGENT, SOUTHWEST BUILDING TRADES COUNCIL OF MONTANA, AFL-CIO

Respondents

and — Case No. 19-CC-588

SUMMIT VALLEY INDUSTRIES, INC.

and — Case No. 19-CC-591

JACK McLEOD & ASSOCIATES, INC.

and — Case No. 19-CC-604
Case No. 19-CC-604-2

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, FOR AND ON BEHALF OF ITS MEMBER BOISE CASCADE CORPORATION AND ALL OTHER SIMILARLY SITUATED MEMBERS

Case No. 19-CE-21
Case No. 19-CD-212

James F. Kennedy, Esq., and *Leslie S. Waite, Esq.* for the General Counsel.
Poore, McKenzie and Roth, by Donald C. Robinson, Esq., of Butte, Montana, for Charging Party Summit Valley.
McCaffrey and Peterson by John L. Peterson, Esq., of Butte, Montana, for Charging Party McLeod.
Lederer, Fox and Grove, by *S. Richard Pincus, Esq.* and *Lawrence M. Cohen, Esq.*, of Chicago, Ill., for Charging Party The Chamber.
Gerard C. Smetana, Esq., of Chicago, Ill., for Charging Party The Chamber.
Holland, Holland & Haxby, by Dave Holland, Esq., of Butte, Montana, for Respondent Carpenters.
Bailey, Doblie, Ceniceros and Bruun, by *Paul T. Bailey, Esq.*, and *Gerald C. Doblie, Esq.*, of Portland, Oregon, for Respondent Carpenters.
Benjamin W. Hilley, Esq., and *Emily Loring* of Great Falls, Montana, for Respondent Council.

JD-(SF)-74-74

DECISION

Statement of the Case

LOUIS S. PENFIELD, Administrative Law Judge: This consolidated proceeding was heard before me in Butte, Montana, on 15 hearing dates occurring between June 5, 1973 and October 26, 1973. The consolidated complaint was issued on May 11, 1973. The charges in Cases Nos. 19-CC-588 and 19-CD-212 were filed by Summit Valley Industries, Inc., herein called Summit Valley, on October 12, 1972. The charge in Case No. 19-CC-591 was filed on October 19, 1972 by Jack McLeod & Associates, Inc., herein called McLeod. The charges in Cases Nos. 19-CC-604 and 19-CE-21 were filed on January 5, 1973, and the charge in 19-CC-604-2 was filed on January 12, 1973. Each of the latter charges was filed by the Chamber of Commerce of the United States of America, herein called the Chamber. Copies of each of the charges were duly served upon the parties. The consolidated complaint alleges that Respondent United Brotherhood of Carpenters & Joiners of America, Local 112, AFL-CIO, herein called the Carpenters, engaged in various unfair labor practices in violation of Sections 8(b)(4)(i)(ii)(A) and (B), 8(b)(4)(i)(ii)(D) and 8(e) of the Act.

(Decision, p. 2).

* * *

Findings of Fact

* * *

III. The Unfair Labor Practices

* * *

(Decision, p. 3).

A. Modular Houses, Stickbuilt Houses, And Carpenters' Work

Respondent Carpenters represents journeymen and apprentice carpenters in the Butte area who work on the construction of dwellings in commercial or industrial buildings. Carpenters normally work for area contractors and perform their work either at a building site or in the shops of the contractors. For many years, collective-bargaining agreements between Butte contractors and Respondent Carpenters have controlled the working conditions.

The traditional so-called stickbuilt house involves the work of various crafts, each represented by a different union. For the most part, the differing skills and the jurisdictional lines between the crafts are well defined. A stickbuilt house normally starts with the digging of a foundation; preliminary piping follows; footings and concrete walls are then put in; a frame is built; piping and basic wiring go in; outside siding and roofing are put on; and finally there will be inside finishing and the installation of cabinets. Materials used by the different crafts will be delivered to the jobsite, some in a substantially prefabricated state. Onsite work, however, by all crafts follows a more or less well-defined sequence toward completion, with steady work performance depending on the availability of workers in each craft as its work is needed. Reasonably good weather conditions are required for most jobsite work to progress. In the case of the Butte carpenters, many innovations have been accepted in the past 25 years. These include the use of power tools, precut lumber, prefabricated cabinets, and many other items. It is estimated that as a result of such innovations two car-

penters at the present time, are able to do the same amount of work which formerly required the use of five carpenters.

Modular houses are best described as factory built. They are a fairly recent development in the house building industry. This proceeding directly involves two modular house manufacturers, Summit Valley Industries, Inc. and Boise Cascade Corporation. Summit Valley, the smaller of the two enterprises, is located in Butte. The far larger Boise Cascade factory is located in Pocatello, Idaho, some 250 miles from Butte, a location from which it serves a large area.

The construction process followed with a factory built house is similar at both enterprises. The houses are built pursuant to a few well-standardized plans. The construction takes place indoors and follows what is essentially an assembly line process. Because of its fixed pattern, the work called for is frequently repetitive. This enables the manufacturer to staff the plant with job trained workers rather than having to call upon the journeymen and apprentice craftsmen that jobsite construction demands. In such a plant, full use will be made of overhead cranes and readily available power equipment of a diversified nature. This makes a substantial contribution toward an efficient operation and a steady flow of work. Normally, several houses will be on the production line at the same time. This will make it possible to move employees from one area to another, and make full use of their limited job trained skills. Since all work is done indoors, inclement weather does not result in work interruptions. Accord-

ingly, employees working for modular house manufacturers have an opportunity for far steadier employment than comes to employees working at jobsites. The centralization of construction on all the houses also enables the manufacturers to keep substantial inventories of materials and take full advantage of lower costs which may come about through making large purchases.

Summit Valley produces only three different models of modular houses from which a buyer may choose. Each of these has a standard basic design but a variety of options are open to a buyer. Boise Cascade has some 35 different plans and a greater variety of options. A modular house will come from either factory as a finished product completely wired, completely plumbed, with all appliances installed, with the carpeting laid, and with the painting completed. It needs only to be transported to the building site, placed on a foundation, and to undergo what is called stitching together to become immediately habitable. The required stitching, however, involves a substantial amount of work. The stitching is absolutely essential for each modular house, and much of such work falls within the carpenter's craft. Larger houses are usually transported in two halves which must be joined at the jobsite by a stitching process. In every case there also will be wires and plumbing to be connected, and usually the job will include the hanging of some inside doors, and the building of stoops, stairs or railings. A modular house, of course, must always be placed upon a foundation. This will have been constructed prior to delivery. The construction of foundations for modular or stickbuilt houses does not differ.

Modular houses are generally marketed to prospective purchasers, either by the manufacturer directly or through a dealer. Generally speaking, the purchaser chooses a model from an available plan, chooses the options he desires and makes an initial deposit. After this the house will be built at the plant. Upon its completion the manufacturer will receive the agreed upon price usually obtained by financing with a lending institution. The completed house will be transported to the building site by the manufacturer. Ordinarily the purchaser makes his own arrangements with the contractor to put in an appropriate foundation and do the needed stitching. Summit Valley markets the houses which it builds directly. At times material to this proceeding, Jack McLeod & Associates was the franchised dealer for the Boise Cascade houses sold in the Butte area.

From the foregoing, it is apparent that each type of dwelling is the product of a differing process. The building of a stickbuilt house is for the most part a continuing jobsite process involving the intermeshing of a number of crafts. These crafts, following a somewhat fixed sequence, assemble and construct the finished habitable dwelling from a variety of material delivered to the jobsite in a greater or lesser prefabricated state. The overall size, the floor plan and the variety of elaborations in a stickbuilt house are limited only by the money which the owner is prepared to spend. On the contrary, a factory built modular house is a standardized product. It is strictly limited as to size and pattern, with few variations in design or floor plan available. The options re-

late principally to such matters as types of wiring, types of appliances to be installed, and differences in the paint or other decor. The size of a modular house is limited by the manufacturer's design, and such houses come only in a range between 1,000 and 1,800 square feet. It is conceded that the cost per square foot of a modular house is less than the cost per square foot of a stickbuilt house of comparable size and finish. Considerable testimony was received as to the relative cost of the two types of houses, but it became apparent that so many variables were involved that any definitive determination as to the precise range of the differential is not practical. Suffice it to say that the record establishes the differential to be substantial, and the comparable quality of the two types of houses sufficiently close that given similar sized houses, the lower priced modular house would have a marked competitive advantage. The record further shows there is a shortage of houses in the price bracket within which modular houses fall. Thus it is a fair assumption that the price advantage will frequently result in a modular house being chosen by a prospective purchaser, despite its standardized pattern.

As noted above, the manufacture of a modular house, unlike the erection of a stickbuilt house, does not require the use of skilled employees. Thus the employment pattern at the manufacturer's plants ignores craft lines, and the work force is comprised of job trained production and maintenance employees. Both Summit Valley and Boise Cascade employees are organized along industrial lines. At Summit Valley, Local No. 2 International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein called the Teamsters, represents the employees in a production and maintenance unit. The Team-

sters' contract wage scale is substantially lower than that provided for the journeymen and apprentice carpenters found in the contract between Respondent Carpenters and the Butte Contractors. Absence of a weather problem, however, makes plant employment possible on a more steady basis. A Local of United Brotherhood of Carpenters and Joiners of America represents the Boise Cascade workers in Pocatello, also on an industrial basis. Although the record does not disclose the wage scale it is a fair assumption that the pattern is substantially similar to that found at Summit Valley.

It is both traditional, and necessary, that in building a stickbuilt house, carpenters will do all needed woodwork on the foundation and basements, all woodframing, all interior and exterior siding, all shingling, and the installation of all the cabinets. When a modular house is taken to a jobsite only the foundation forms, the stitching, and some work on stairs, railings and doors remain to be done at the jobsite. All the interior and exterior woodwork will have been done at the factory. This necessarily means that there will be less jobsite work for carpenters in any given situation where the house is modular rather than stickbuilt.

B. *The Background, the Strike and Article XXII*

Respondent Carpenters and some fifty contractors in the Butte area who employ carpenters, have had a collective bargaining relationship for many years. Insofar as this record shows, prior to 1969, no serious problems relating to onsite construction work had arisen between these contracting parties.

In 1969, John A. Bender, a Butte realtor, became the franchised dealer for Interstate Homes, Inc. Interstate manufactured modular houses in a nonunion plant located in Salt Lake City, Utah. Houses that Bender sold to customers were to be shipped by Interstate to the Butte area and placed on appropriate foundations there. The foundation and the stitching work was to be done by contractors employed by Bender or his customers. When this was noted by Respondent Carpenters, Respondent Council and other construction unions, they brought pressures against the Butte contractors to prevent their doing the needed work to make the houses habitable. This resulted in 8 (b) (4) (B) charges lodged against Respondent Carpenters, Respondent Council and the Laborers' Union. The issue was litigated and a Board decision was issued on January 29, 1971 in *Southwest Building Trades Council of Montana, et al.* (*John A. Bender*) 188 NLRB 224, herein called the *Bender* case. The Board found the conduct of all three labor organizations to be violative of Section 8 (b) (4) (ii) (B) of the Act. An examination of the decision makes it apparent that the unions viewed with alarm the entry of prebuilt houses into the Butte area. Their objections were expressed both in terms of the nonunion manufacture of such houses, and fear of loss of jobs by local craftsmen should many of these prebuilt houses reach the area. It was the latter that appears to have been the primary concern of James Cadigan, then and still the Carpenters' business agent, for he is reported to have expressed himself by stating "Our dispute is protecting the work of our people." The Board found, however, that even a work preservation object would not insulate the unions from 8 (b) (4) sanctions in the existing circum-

stances, because they were exerting their pressures on the wrong persons, and thus were using a proscribed means of enforcing even a lawful object. At the time of *Bender,* none of the unions had a contract containing a work preservation clause of any sort. Thus the contractors had neither a contractual obligation nor the power to give any of the work on the houses to any of the Butte unions except for the foundation and stitching work. Thus it was reasoned that at this time, the real dispute of the unions was with Interstate and Bender. Therefore pressures directed against the contractors involved them in a dispute not their own, with an object of causing such contractors to cease doing business with Interstate and Bender, and such conduct was found to be violative of Section 8 (b) (4) (ii) (B).

(Decision, p. 4-7).

* * *

The record establishes that while it may not be impossible to manufacture or deliver structures in the unfinished state required by Article XXII, both Summit Valley and Boise Cascade deem such a mode of operation to be impractical. In substance, each would regard a structure only completed so as to conform to Article XXII as a different product from the fully finished modular house each now delivers. Each believes that to undertake the fabrication of such a product would defeat many of the economic advantages of their current production line manufacturing process. They also see dangers of damage in transit both from the lack of rigidity of such a structure and from its unenclosed state in inclement weather. Each would also foresee problems in getting insurance and ade-

quate financing for an unfinished house. In addition each views such an unfinished house as far less marketable, and in all likelihood ultimately more costly. A production change to produce such unfinished houses would be a major one which each would regard as highly undesirable even though theoretically possible.

In view of the foregoing, I am satisfied, and find that enforcement of Article XXII as interpreted by Cadigan would make it impossible for any Butte contractor to do any of the work necessary to make the Summit Valley and Boise Cascade modular houses habitable. Thus enforcement of the clause would force or require such contractors to cease doing business with these two manufacturers unless and until they changed their mode of operation so as to deliver their houses to jobsites in the unfinished state required by Article XXII.

(Decision, p. 11).

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C. *The Events Immediately Preceding and the Incidents Resulting in the Charges in the Instant Cases*

• • •

Summit Valley is a local Butte enterprise. It did not come into being until June of 1972. Summit Valley is owned by a number of Butte residents including Gene Spolar who, in addition to being part owner, also serves as plant manager. Prior to undertaking the management of Summit Valley, Spolar had been a building contractor in the Butte area, owning and operating a business known

as Spolar Construction, Inc. Spolar Construction, Inc. was party signatory to the collective-bargaining agreement with Respondent Carpenters which includes Article XXII. Although Spolar Construction, Inc. may still exist as an entity, it does not appear to have functioned actively as a building contractor after Summit Valley began its operations in June with Gene Spolar in charge. In hiring employees for Summit Valley, Spolar made no effort to hire employees skilled in any building construction crafts. Instead, from the outset, Spolar hired unskilled workers and undertook to give them job training in the manufacturing process. Respondent Carpenters initially believed Spolar Construction to be operating the plant in violation of its contract and its bargaining obligation and it filed charges relating to such conduct. These charges were subsequently withdrawn by Respondent Carpenters when it learned that Summit Valley was an entirely separate entity. Shortly after the plant opened, Butte Teamsters Union, Local No. 2, herein called the Teamsters, undertook to organize the Summit Valley plant employees. Neither at that time, nor at any time later, has Respondent Carpenters made any claim to represent the plant employees at Summit Valley. Summit Valley accorded the Teamsters recognition as the statutory representative of its employees, and in September 1972 executed a contract with the Teamsters covering the working conditions of such employees. The bargaining unit is described as "all production workers, fabricators, erectors, assemblyline workers, maintenance workers, cleanup workers, watchmen, and drivers employed by the employer at its Butte, Montana, operation."

(Decision, p. 12-13).

• • •

The Summit Valley Incidents—As we have seen, Summit Valley entered into a contract with Teamsters shortly after it commenced its operation in June of 1972. While this agreement was primarily applicable to the production and maintenance workers at the plant itself, it contained a provision which reads as follows:

> The employer recognizes the jurisdiction of the Union over all manufacture and assembly work, including following the product to its final destination and preparation of the site, so as to preserve and protect the integrity of the products manufactured by the bargaining unit.

The Jovick incident establishes that because of Article XXII employees of the contractors were not to do onsite work on Summit Valley houses. Accordingly customers of Summit Valley requested that Summit Valley undertake the needed work pursuant to the contractual provision in the Teamster contract above set forth, in order that the modular houses purchased from Summit Valley might be made habitable. It was shortly after this that Respondent placed a picket at the Summit Valley plant. The picket carried a sign reading:

> This employer does not employ members of Carpenters Union in the work to be performed on this building. Local 112, Carpenters Union, AFL-CIO.

The building referred to in the picket sign was a completed modular house manufactured by Summit Valley, which was situated in close proximity to the picket sign. This picketing brought about the charges filed by Summit Valley in 19-CD-212. This case in combination with 19-CC-588 and 591 resulted in the General Counsel obtaining

a 10 (1) injunction from a U. S. District Court which issued on November 8, 1972.[4]

Following a 10 (k) hearing in 19-CD-212, the Board issued a Decision and Determination of Dispute in *United Brotherhood of Carpenters & Joiners of America,* 202 NLRB No. 153 on April 6, 1973. The findings of the Board as set forth in that decision need not be repeated here. Suffice it to say that the Board concluded that employees of Summit Valley, currently represented by Teamsters, "are entitled to the work of manufacturing or building of prebuilt or modular homes and other structures, *including work necessary to make these structures habitable,* to the extent that all such work is claimed by the United Brotherhood of Carpenters & Joiners of America, Local 112, AFL-CIO, pursuant to its collective bargaining agreement with Silver Bow Employers Association and Butte Contractors Association." (Underscoring supplied) Thereafter, Respondent Carpenters advised the Regional Director that it would not require Summit Valley to assign work in violation of the Act but stated further:

> That the Union affirms that it has the right, and will under some circumstances use its rights under the National Labor Relations Act, to truthfully advise the public, whether by picketing or other publicity that the Summit Valley Industries, Inc., does not employ members of, or have a contract with the United Broth-

---

4 By terms of the injunction Respondent Carpenters were enjoined from picketing or otherwise inducing employees of Jovick with an object of forcing Summit Valley to assign work to employees represented by Respondent Carpenters rather than represented by Teamsters, and also enjoined from unlawful enforcement of Article XXII by forcing the contractors to cease doing business with McLeod or Boise Cascade. Such injunction is still in effect.

> erhood of Carpenters & Joiners of America, Local 112, AFL-CIO, if, in fact, such is the truth and such picketing or publicity is for the sole purpose of advising the public of the situation.

Inasmuch as Respondent Carpenters had made a similar informational claim during the course of the 10 (k) hearing the Regional Director did not construe the language set forth above as an unequivocal disclaimer of Carpenters' interest in obtaining the onsite work. Accordingly, the complaint in the CD case was issued. No evidence was adduced in the instant proceeding indicating that the situation thereafter has changed in any particular.

(Decision, p. 18).

* * *

F. *The Conduct Alleged as Violative of Section 8 (b) (4) (D)*

The charges in 19-CD-212, the circumstances surrounding the picketing of Summit Valley, the injunction, and the 10 (k) hearing and its result, have been referred to above. The economic pressures have been found violative of Section 8 (b) (4) (B). But there remains the question of whether such economic pressures shall also be regarded as violative of Section 8 (b) (4) (D).

Following the 10 (k) hearing, the Board in its Decision and Determination of dispute issued on April 6, 1973 (footnote omitted), ruled that there was "reasonable cause to believe that a violation of Section 8 (b) (4) (D) had occurred, and that the dispute is properly before the Board for determination." The Board went on to hold that Teamsters were entitled to "the work of manufacturing or building of prebuilt or modular homes and other structures, in-

cluding work necessary to make the structures habitable. . . ." Thereafter the General Counsel determined that Respondent Carpenters had not given an unequivocal indication of its intent to be bound by the Board's determination. Accordingly, the complaint before us was issued.

In the 10 (k) determination the Board rejected Respondent Carpenters' claim that its pressures were exerted solely against Jovick, related solely to enforcement of Article XXII, and that no pressures were directed against Summit Valley to bring about a change in work assignment from Teamsters to Carpenters. With regard to the circumstances supporting its conclusion that there was reasonable cause to believe that a violation of Section 8 (b) (4) (D) existed, the Board stated the following:

> Viewing the total circumstances of this case, we find that Carpenters' conduct went beyond merely attempting to enforce Article XXII against Jovick. By pulling Jovick's employees off the jobsite and threatening to picket [Summit Valley's] workmen if they followed their work to the jobsite and completed the work thereon, Carpenters, for all intents and purposes was preventing [Summit Valley] from delivering its product to its customers in salable condition. Only if [Summit Valley] drastically curtailed its inplant operations and delivered the components of each modular house to the jobsite so that Carpenters would then do the work guaranteed by Article XXII, Section 3 (a), in other words, reassign its plant work from Teamsters to Carpenters, would Carpenters remove pressure from [Summit Valley] and its subcontractor, Jovick.
>
> Corroborative of Carpenters' unlawful objective is the evidence of a more direct pressure placed on [Summit Valley] by Carpenters. The record clearly shows that Carpenters picketed [Summit Valley's]

> plant for the express purpose of effecting a reassignment of the prefabrication of the modular houses from workmen represented by Teamsters to workmen represented by Carpenters, either on the jobsite or in the plant. Cadigan in fact admitted that the picketing would have ceased had the inplant work been given to members of Carpenters. Furthermore, Cadigan testified that additional picketing and handbilling would take place if Teamsters insisted on following the work to the jobsite.

Respondent's letter to the Regional Director, which is quoted above, clearly does not signify an unequivocal intention upon the part of Carpenters to abandon the position taken by the Carpenters in the 10(k) proceeding and subsequently rejected by the Board. The Carpenters neither urged, nor does the record disclose, any newly discovered evidence which would indicate that there has been any change in circumstances or change of its position. Thus it appears that all matters relating to the work assignment question were previously considered and have been decided by the Board. Indeed, nowhere in its brief does Carpenters urge or argue to the contrary. Although Carpenters has asserted in this case that it has no interest in representing employees in the Summit Valley plant, it made a similar representation in the 10(k) proceeding, and thereafter, including the hearing in the instant case, has failed to assert without equivocation that picketing of either the plant or the houses at the jobsite will be altogether abandoned. It is well settled that where no newly discovered evidence is adduced, matters considered at the

10(k) hearing are not to be relitigated and the result theretofore found by the Board controls.[16]

Accordingly I find that Respondent by its picketing, and other unlawful pressures against Summit Valley, for reasons set forth above and heretofore found by the Board to constitute reasonable cause to conclude the conduct unlawful, and its refusal to comply with the Board's Decision and Determination of Dispute, has engaged in conduct violative of Section 8(b)(4)(i)(ii)(D) of the Act.

(Decision, p. 44-46).

• • •

ORDER

Respondent, its officers, agents, and representatives, shall:

1. Cease and desist from:

(a) Inducing or encouraging any employee to refuse to work on, handle or transport any modular house, or threaten or coerce any person, including Butte area contractors or any other employer engaged in some aspect of constructing, transporting, or handling modular houses, where in either case an object of such pressures is to force or require the Butte area contractor, or any other person, to cease working on a modular house at a jobsite, either altogether, or unless and until such house be brought to the jobsite in a condition which conforms to Article XXII of the contract; or where an object is to force or

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16 *International Brotherhood of Electrical Workers, Local 3 (Mansfield Contracting Corporation)* 206 NLRB No. 84; *Bricklayers Local 1 (Shelby Marble and Tile Co.) v. N.L.R.B.*, 475 F. 2d 1116, 82 LRRM 2746 (D. C. Circuit, 1973).

require the manufacturers of modular houses either to cease bringing such houses into the Butte area altogether, or to change their mode of operation so that such houses are brought to Butte area jobsites in a condition that conforms to Article XXII of the contract.

(b) Refusing to comply with the Board's Decision and Determination of Dispute by picketing, or other economic action, directed at Summit Valley, or any other person, where an object is to force or require Summit Valley to assign carpentry work, whether in-plant or on-site, to employees who are members of Respondent Carpenters, rather than to employees who are members of Teamsters.

2. Take the following affirmative action which I find to effectuate the policies of the Act:

(a) Post in conspicuous places at Respondent's business offices, meeting halls, and all other places where notices to members are customarily posted, copies of the notice attached hereto and marked "Appendix." (footnote omitted). Copies of said notice, on forms provided by the Regional Director for Region 19 shall, after having been duly signed by Respondent Carpenters' authorized representatives, be posted by Respondent Carpenters immediately upon receipt thereof and be maintained by it for 60 consecutive days. Reasonable steps shall be taken by Respondent Carpenters to insure that said notices are not altered, defaced or covered by any material.

(b) Rescind any fines assessed, refund any fines collected and restore membership status in any case where union members have been penalized for engaging in con-

duct deemed by Respondent Carpenters to have been violative of Article XXII of its existing contract.

(c) Sign and mail sufficient copies of the notice to the aforesaid Regional Director for forwarding to any employer involved in the construction or transportation of modular houses destined for Butte area jobsites for posting by them, if they are willing, in all locations where notices to employees are customarily posted.

(d) Notify the Regional Director for Region 19 in writing within 20 days from the date of this Order what steps Respondent Carpenters is taking to comply herewith.

It is further recommended that the allegations of the complaint alleging violations by Respondent Carpenters of Sections 8(e) and 8(b)(4)(i)(ii)(A) be dismissed, and that the allegations alleging violations by Respondent Council of Sections 8(e) and 8(b)(4)(ii)(A) and (B) be dismissed.

Dated: May 9, 1974.

/s/ Louis S. Penfield
Administrative Law Judge

(Decision, p. 48-49).

* * *

Joint Appendix

Office - Supreme Court, U.S.
FILED
JAN 25 1982
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CLERK

NO. 81-497

In the Supreme Court of the United States

OCTOBER TERM, 1981

SUMMIT VALLEY INDUSTRIES, INC.,
a Montana corporation,
Petitioner,

vs.

LOCAL 112, UNITED BROTHERHOOD OF
CARPENTERS AND JOINERS OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOINT APPENDIX

DONALD C. ROBINSON, ESQ.
Poore, Roth & Robinson, P.C.
Attorneys at Law
1341 Harrison Avenue
Butte, Montana 59701-4898
Telephone: (406) 782-1223
Attorneys for Petitioner

PAUL T. BAILEY, ESQ.
DAVID S. PAULL, ESQ.
Bailey & Paull
Attorneys at Law
208 Bailey Building
5441 S.W. Macadam Avenue
Portland, Oregon 97201
Telephone: (503) 221-0077
Attorneys for Respondent

PETITION FOR CERTIORARI FILED
SEPTEMBER 10, 1981
CERTIORARI GRANTED NOVEMBER 30, 1981

TABLE OF CONTENTS

APP. A: Ninth Circuit Court Opinion, *Summit Valley Industries, Inc. vs. Local 112, United Brotherhood of Carpenters and Joiners of America,* Cause No. 79-4663 (9th Cir. 1981, unpublished opinion) 3

APP. B: District Court Opinion, *Summit Valley Industries, Inc. vs. Local 112, United Brotherhood of Carpenters and Joiners of America,* 475 F. Supp. 665 (D. Mont. 1979) 5

APP. C: Relevant Docket Entries (Excised) ... 10

APP. D: Complaint 15

APP. E: Answer and Cross Claim 22

APP. F: Preliminary Pre-Trial Order 26

APP. G: Opinion and Order re Collateral Estoppel 28

APP. H: Order Granting Partial Summary Judgment 30

APP. I: Transcript of Proceedings 31

APP. J: Plaintiff's Exhibits 1, 7 and 8 70

APP. K: Opinion, National Labor Relations Board, *Carpenters, Local 112 (Summit Valley Industries),* 202 NLRB No. 153, 83 LRRM 1013 (1973) .. 73

APP. L: Excerpts of Decision of Administrative Law Judge, National Labor Relations Board (1974, unpublished decision) 82

APP. M: Opinion, Ninth Circuit Court of Appeals, *United Brotherhood of Carpenters and Joiners of America, Local Union No. 112, AFL-CIO vs. NLRB,* 574 F.2d 457 (1978) 178

APP. N: Section 10 of the Labor-Management Relations Act (29 U.S.C. §160) ... 196

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DONALD C. ROBINSON, ESQ.
Poore, Roth & Robinson, P.C.
Attorneys at Law
1341 Harrison Avenue
Butte, Montana 59701-4898
Telephone: (406) 782-1223
Attorneys for Petitioner

PAUL T. BAILEY, ESQ.
DAVID S. PAULL, ESQ.
Bailey & Paull
Attorneys at Law
208 Bailey Building
5441 S.W. Macadam Avenue
Portland, Oregon 97201
Telephone: (503) 221-0077
Attorneys for Respondent

PETITION FOR CERTIORARI FILED SEPTEMBER 10, 1981
CERTIORARI GRANTED NOVEMBER 30, 1981

APPENDIX A

DO NOT PUBLISH

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Summit Valley Industries, Inc.,
a Montana corporation,
Plaintiff-Appellant,

vs.

Local 112, United Brotherhood of
Carpenters and Joiners of America,
Defendants-Appellees.

No. 79-4663

Summit Valley Industries, Inc.,
a Montana corporation,
Plaintiff-Appellee,

vs.

Local 112, United Brotherhood of
Carpenters and Joiners of America
and James Cadigan, its Agent,
Defendant-Appellant.

No. 79-4673
Memorandum

Argued and Submitted — May 8, 1981
Decided — June 5, 1981
Appeal from the United States District Court

for the District of Montana
Russell E. Smith, District Judge, Presiding

Before: GOODWIN and KENNEDY, Circuit Judges, and WATERS,* District Judge

Summit Valley Industries, Inc. (Summit Valley) brought this suit under Section 303 of the Labor-Management Relations Act, 29 U.S.C. § 187, for damages sustained as a result of Local 112's secondary activities. Summit Valley contends that the district court erred by refusing to award reimbursement for attorney's fees incurred by it in an unfair labor practice proceeding before the National Labor Relations Board (NLRB). Summit Valley contends that legal fees incurred before the NLRB to secure a cessation of illegal secondary activities are a proper element of damages under Section 303. We recognize that other Circuits hold a different view, *Associated General Contractors of Minnesota v. Construction and General Laborers Local No. 563,* 612 F.2d 1060 (8th Cir. 1979); *Texas Distributors, Inc., v. Local Union No. 100,* 598 F.2d 393 (5th Cir. 1979); *F. F. Instrument Corp. v. Union de Tronquistas de Puerto Rico,* 558 F.2d 607 (1st Cir. 1977); *Local Union No. 984, International Brotherhood of Teamsters v. Humko Co.,* 287 F.2d 231 (6th Cir.), *cert. denied,* 366 U.S. 962 (1961), but this Circuit has held that damages under Section 303 do not include reimbursement for attorney's

*The Honorable Laughlin E. Waters, United States District Judge for the Central District of California, sitting by designation.

fees incurred before the NLRB. *Mead v. Retail Clerks International Association,* 523 F.2d 1371 (9th Cir. 1975); *Maxey v. Butchers' Union Local No. 126,* 627 F.2d 912 (9th Cir. 1980). We are bound by the authority of this Circuit and Summit Valley's appeal is, therefore, without merit.

Local 112 cross-appeals from the judgment and contends that the district court should not have awarded Summit Valley $1,176 in damages. The district court's award is adequately supported in the record.

Affirmed.

APPENDIX B

SUMMIT VALLEY, ETC. v. LOCAL 112, 665 UNITED BROTH.

Cite as 475 F. Supp. 665 (1979)

SUMMIT VALLEY INDUSTRIES, INC.,
a Montana Corporation, Plaintiff,

v.

LOCAL 112, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA,
Defendant

No. CV 74-121-BU

United States District Court,
D. Montana,
Butte Division.
Aug. 27, 1979.

In a proceeding relating to the recovery of attorneys' fees, the District Court, Russell E. Smith, J., held that

employer could not recover attorneys' fees incurred in obtaining injunction against union's illegal activities but could recover damages based on time lost by plant manager.

Order accordingly.

* * *

(headnots omitted)

Donald C. Robinson, Poore, McKenzie, Roth, Robischon & Robinson, Butte, Mont., for plaintiff.

Paul T. Bailey, Portland, Or., Robert J. Holland, Butte, Mont., for defendant.

FINDINGS OF FACT

I.

RUSSELL E. SMITH, District Judge.

It was necessary to the survival of Summit Valley Industries, Inc. (Summit Valley) as a business to prevent the defendant, Local 112, United Brotherhood of Carpenters and Joiners of America (Union), from violating §§ 8 (b)(4)(B) and 8(b)(4)(D) of the Act (29 U.S.C. §158(b)(4)(B) and (b)(4)(D)). To that end, by reason of continued threats on the part of the Union, it was necessary to employ attorneys from the time of the commencement of the picketing until the time of the denial of certiorari by the Supreme Court of the United States.

II.

The firm of Poore, Roth, Robischon & Robinson, P.C., was employed by the plaintiff to stop the Union's violations of the Act. The reasonable value of the legal services rendered for this purpose and during the time described in Paragraph I, and the amount for which plaintiff became obligated, was the sum of $12,584.65. The amount of costs incurred was $1,019.68. The total obligation of plaintiff for such legal fees and costs was the amount of $13,604.33.

III.

Of necessity, the plaintiff's plant manager, Eugene Spolar (Spolar), participated in all of the proceedings leading to the issuance of an injunction. The time spent was 147 hours. He was at the time being compensated at the rate of $2,000.00 per month and worked approximately 60 hours per week. His hourly rate was about $8.00. The cost of the services lost by plaintiff was the sum of $1,176.00.

CONCLUSIONS OF LAW

[1] I conclude that the plaintiff is not entitled to recover damages for attorneys' fees. I base this conclusion on the case of *Mead v. Retail Clerks Local 839,* 523 F.2d 1371 (9th Cir. 1975), by which, regardless of my own opinion, I am bound. The court in that case, noting that there were contrary decisions, held that the attorneys' fees incurred in proceedings before the NLRB were not recoverable under the Labor Management Relations Act, 1947, § 303, 29 U.S.C. § 187. Plaintiff seeks to distinguish

the *Mead* case on the ground that the illegal activity in *Mead* had ceased before the NLRB proceeding was filed. That fact, if it is a fact, is not apparent from the decision, and, in any event, was not stated to be a reason for the result reached. *Mead* appears to me to be grounded in the policies expressed in *Alyeska Pipeline Service Co. v. Wilderness Society,* 421 U.S. 240, 95 S. Ct. 1612, 44 L. Ed. 2d 141 (1975), reinforced by a desirability in labor relations cases of deferring to the power of the NLRB to fix attorneys' fees as a part of its duty to effectuate the policies of the Act. I am aware that in the case of *Sillman v. Teamsters Local 386,* 535 F.2d 1172 (9th Cir. 1976), the Court of Appeals for the Ninth Circuit did affirm a district judgment which included an award for attorneys' fees incurred in the related unfair labor practice proceedings. What happened in *Sillman* was that the appellant union in its brief filed July 3, 1974, in apparent reliance on *Sheet Metal Workers Local 223 v. Atlas Sheet Metal Co.,* 384 F. 2d 101 (5th Cir. 1967), which it cited, did not specify the award of attorneys' fees by the district court as error. The decision in *Mead,* which expressly disavowed *Sheet Metal Workers,* was not decided until October 1975. In *Sillman* the point decided by *Mead* was raised by specification of error and was, by virtue of *Sheet Metal Workers,* virtually conceded. *Mead* was not mentioned in either the briefs or the opinion and in my opinion cannot be said to have been overruled or distinguished by *Sillman.*

The plaintiff's claim for damages, based upon a loss of Spolar's time, is troublesome. The defendant's unlawful activity did require NLRB proceedings, which in turn caused Spolar to absent himself from his usual super-

visory activities. The company did lose Spolar's time. It may be noted here that Spolar, who was uncontradicted, said that the loss of his time did cause a loss of production. In somewhat similar circumstances courts have allowed as damages the salaries of employees rendered unproductive by reason of illegal union activity. *See Refrigeration Contractors, Inc. v. Local 211, United Association of Journeymen,* 501 F. 2d 668 (5th Cir. 1974); *Abbott v. Local 142, United Associations of Journeymen,* 429 F. 2d 786 (5th Cir. 1970); *Sheet Metal Workers Local 223 v. Atlas Sheet Metal Co.,* 384 F. 2d 101 (5th Cir. 1967); *Mason-Rust v. Laborers Local 42,* 306 F. Supp. 934 (E.D. Mo. 1969); *aff'd,* 435 F. 2d 939 (8th Cir. 1970); *Wells v. International Union of Operating Engineers, Local 181,* 206 F. Supp. 414 (W. D. Ky. 1962).

There is some language in the decisions which seems to equate attorneys' fees with other expenses of litigation. Thus, in *Mead v. Retail Clerks Local 839,* 523 F. 2d 1371 (9th Cir. 1975), it was said at 1380:

> Expenses of prior litigation, including attorneys' fees may be recovered where, because of a defendant's wrongful conduct, the plaintiff was forced to prosecute or defend an action involving a third party;

and, at 1381:

> The Board recently reasserted its adherence to this general rule but held that the charged party may be required to reimburse the charging party's expenditure for attorneys' fees and other costs of litigation if the charged party's defense before the Board is frivolous or in bad faith . . . . It is for the Board, not the courts, to determine whether the conflicting interests are best resolved by imposing litigation costs

upon the defeated party before the Board.

[2] Despite the quoted language, it is my opinion that damages may be awarded here for Spolar's lost time. Section 303(b) provides that a successful plaintiff "shall recover the damages by him sustained and the cost of the suit." The loss of Spolar's time, for which plaintiff paid, is, after all, a "damage sustained," and the damage is sustained because of defendant's illegal conduct. In a sense, the loss of Spolar's time is one of the costs of the litigation, but it is nonetheless a damage sustained. I do not think that *Mead,* in disallowing attorneys' fees, logically compels a decision that the claim for Spolar's time should be disallowed. Attorneys' fees are generally disallowed, and allowance is the exception; but the rule as to attorneys' fees is well-articulated and so generally used as to be called the "American Rule." History may justify the decision in *Mead,* but there is no uniform rule as to other litigation costs. The loss of an employee's time because of litigation is a damage. There is no history so clear that such damage should not be allowed because it could also be classified as a cost of litigation.

APPENDIX C

CHRONOLOGICAL RELEVANT DOCKET ENTRIES

CIVIL DOCKET
UNITED STATES DISTRICT COURT

BUTTE DIVISION

RUSSELL E. SMITH

Jury demand date: 1-29-75 by Deft. United Br'hood of Carpenters & Joiners, CA #79-4663, CA #79-4673 (cross appeal)

Title of Case

SUMMIT VALLEY INDUSTRIES, INC.,
A Montana Corporation
Plaintiff-Appellant (9/25/79) Cross Appellee (9/28/79)

vs.

LOCAL 112, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA
Defendants-Appellees (9/25/79) Cross Appellant (9/28/79)

For plaintiff:
Donald C. Robinson
Poore, Roth, Robischon & Robinson
Box 396, Butte, Montana 59701
792-0488
for plaintiff and cross defts.
Thomas Lutey, William Perusich and Eugene Spolar
(Counsel for Appellant)

For defendant:
Paul T. Bailey
308 Bailey Bldg.
5441 S.W. Macadam Ave.
Portland, Ore. 97201
PH 503-221-0870
FOR: Local 112 & James Cadigan
and
Robert J. Holland
2101 Harrison Ave.
Butte, Mt.
PH. 406-792-9141

FOR Local 112 & James Cadigan
(Counsel for Appellees)

Statistical Record
J.S. 5 mailed 9-30-74
J.S. 6 mailed
$21,573.95
Basis of Action: Damages for illegal picketing & boycott activities to builder of pre-built modular homes
Action arose at: Butte, Silver Bow Co., Montana

Date — Proceedings — Date Order or Judgment Noted

9-25-74 — Filed Complaint — 1

11-11-74 — Filed Motion to Dismiss of defts. — 3

11-11-74 — Filed Brief in support of Motion to Dismiss of defts — 4

11-27-74 — Filed defts. Local 112, United Brotherhood of Carpenters and Joiners of America and James Cadigan ANSWER and CROSS COMPLAINT — 5

1-24-75 — Filed ANSWER of United Brotherhood of Carpenter & Joiners w/Cert. of Mail, thereon — 17

1-29-75 — Filed ANSWER of Cross Defts. Frank Jovick, dba Jovick Construction — 18

2-4-75 — Filed ANSWER OF CROSS-DEFENDANTS WILLIAM PERUSICH, TOM LUTEY & EUGENE SPOLAR — 20

12-18-75 — Filed Preliminary Pretrial Order, Pltff. will within the time previously granted file its reply brief on the collateral estoppel issue & will at same time respond to defts' brief on the defts' cross-claim; all

discovery shall proceed as to all interrogs, requests for admissions, & requests for prod. of docs; & the responses thereto, w/o regard to solution of the motions relating to collateral estoppel; all deadlines for discovery are revoked; case will not be tried until the Board order has become final or is vacated; counsel are directed to cease using letters addressed to the court as a substitute for motions — 55

Docket continuation sheet

RUSSELL E. SMITH

PLAINTIFF, SUMMIT VALLEY INDUSTRIES, INC., a Montana Corporation

DEFENDANT, LOCAL 112, UNITED BROTHERHOOD OF CARPENTERS, et al.,

Docket No. 74-121-Bu

Date — Nr. — Proceedings

7-20-78 — 64 — Filed OPINION AND ORDER directing Plf to file within 20 days a Motion for Partial Summary Judgment and a proposed Order granting same within the same time both parties shall file briefs indicating the issues remaining and the method of trial as to deft Cadigan.

8-4-78 — 67 — Filed Cross Defts Lutey, Perusich & Spolar's Motion for Summary Judgment w/Cert of Service

68 — Filed Plf's Motion for Partial Summary Judgment

10-12-78 — 71 — Filed ORDER granting Summary Judgment on Cross-Claims of Local 112, United Brotherhood of Carpenters & Joiners of America and denying them all relief.

72 — Filed ORDER granting Partial Summary Judgment in favor of Plf and against Deft Local for such amount as may be due Plf as damages and ORDERING that case be placed on calendar for trial on sole issue of damages.

8-6 79 — Entered Record of non-jury Trial at Butte — 1 hour. Court ORDERED that Action as to Mr. Cadigan is Dismissed; Stipulation between Counsel to waive jury trial & to try case before Court instead; Pltff. moved to Amend Complaint by Interlineation as follows: 1) Paragraph 13, line 29, Page 5 — Strike $11,573.95, insert $13,604.33 — SO ORDERED; 2) Paragraph 13, Line 1, Page 6 — strike $5,000. & insert $3,675.00 -- SO ORDERED; 3) Paragraph 13, Line 2, Page 6 — strike all words in lines 2 thru 6 — SO ORDERED; & 4) Prayer, Line 9, Page 6 — strike $21,575.95 & insert $17,279.33 — SO ORDERED; Briefing Schedule: Pltff. may have 5 days w/in which to Reply to Defts. Memorandum which was filed by Clerk on 8-6-79 & Defts. may have 5 days thereafter w/in which to Respond. Upon filing of Brief, matter taken under advisement.

8-6-79 — 80 — Filed Pltffs.' Motion to Amend, by Interlineation, References to damages in Complaint. Acknowledgment of service not signed.

8-28-79 — 84 — Filed Findings of Fact and Conclu-

sions of Law concluding plf is not entitled to recover damages for atty fees.

85 — File ORDER directing Entry of Judgment as set forth in the judgment

86 — Filed and Entered JUDGMENT in favor of deft Cadigan and against Plf; for Plf in the amount of $1,176 against Deft. Local 112 United Brotherhood of Carpenters and Joiners of America, together with its cost herein; and in favor of cross defendants and against cross-claimants in the cross complaint.

9-25-79 — 88 — Filed Notice by Plaintiff of Appeal from final judgment entered 8-28-79.

9-28-79 — 90 — Filed Cross Notice of Appeal by Defendant Local 112 from final Judgment entered 8-28-79

10-23-79 — 91 — Filed Transcript of Proceedings of C. Copeland, Court Reporter

7-17-81 — 96 — Filed cert. copy of Judgment of U.S.C.A. affirming judgment of Dist. Court, Memorandum and Bill of Costs attchd, taxing costs in favor of Appellee Local 112.

APPENDIX D

(Docket Entry 1)

COMPLAINT

(Filed September 25, 1974)

COMES NOW the Plaintiff SUMMIT VALLEY INDUSTRIES, INC., a Montana Corporation, and for its

cause of action against the Defendants prays and alleges as follows:

I.

That this Court has jurisdiction of the action and the parties by virtue of Section 303 (a) and (b) of the Labor Management Relations Act (29 U.S.C. Sec. 141-67, 171-97).

II.

That Plaintiff is a corporation organized and existing under the laws of the State of Montana and is engaged in the manufacture of pre-built modular homes at its factory located in Butte, Montana, and is an employer engaged in an industry and activity affecting commerce within the definition of the National Labor Relations Act (29 U.S.C. Sec. 151-68).

III.

That at all times material Plaintiff's employees have been represented for collective bargaining purposes by Local No. 2, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (hereinafter called Teamsters), which is a labor organization within the meaning of Section 2 (5) of the National Labor Relations Act.

IV.

That the Defendant, LOCAL 112, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS

OF AMERICA is a labor organization within the meaning of Section 2 (5) of the National Labor Relations Act and has its principal offices at Butte, Montana; that the Defendant JAMES CADIGAN is a duly elected official, officer and agent of the said Union and at all times material hereto engaged in acts and conduct on behalf of said Union in this judicial district; that the Defendant UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA (INTERNATIONAL) is a national labor organization within the meaning of Section 2(5) of the Act and is affiliated with and responsible for the maintenance, supervision, direction, and control of its local affiliates, including Defendant LOCAL UNION 112.

V.

That on or about October 2, 1972, at Butte, Montana, Defendant LOCAL UNION 112, acting through its agent JAMES CADIGAN, directed and ordered an employee of Jovick Construction, Inc. to cease performing work on a modular home manufactured by Plaintiff which had been placed on a foundation by a private party who had purchased said home for his use as a dwelling structure.

VI.

That on or about October 3, 1972, at Butte, Montana, and again on or about October 12, 1972, Defendant UNION acting through its officer and agent Defendant CADIGAN, threatened and coerced Frank Jovick, a contractor and member of said UNION, by filing charges

against him alleging that he had violated his collective bargaining agreement, which threats and coercion were for the purpose of requiring and forcing said Frank Jovick to cease performing work on modular homes which were manufactured by Plaintiff and purchased by individual buyers.

VII.

That on or about October 11, 1972, at Butte, Montana, and continuing for several days and weeks thereafter, until enjoined by an Order of this Court, the Defendants began picketing a modular home located near the entrance to Plaintiff's manufacturing plant with a placard which read as follows:

NOTICE TO THE PUBLIC
THIS EMPLOYER DID NOT EMPLOY MEMBERS OF CARPENTERS UNION IN THE WORK PERFORMED ON THIS BUILDING
LOCAL 112, CARPENTERS UNION
AFL-CIO

VIII.

That an object of the Defendants' inducements and threats as described above in Paragraphs V and VI was to force and require a contractor to cease doing business with Plaintiff or the purchasers of Plaintiff's products.

IX.

That an object of Defendants' inducements, threats, and picketing as described above in Paragraphs V, VI,

and VII was to force or require Plaintiff to assign certain manufacturing work to employees represented by Defendant, rather than to employees represented by Teamsters Union, Local No. 2.

X.

That the acts and conduct as set forth herein was found to be in violation of Section 8 (b) (4) of the National Labor Relations Act, and more specifically to be in violation of Sections 8 (b)(4)(i)(ii)(B) and (D) of the Act, as found by the National Labor Relations Board, in a Decision by the Administrative Law Judge on May 9, 1974, a copy of which is attached hereto as Exhibit "A" and by this reference incorporated as a part hereof.

XI.

That said decision finding violations of Section 8 (b)(4) of the National Labor Relations Act will become final by a decision of the National Labor Relations Board, Washington, D.C., which will make final some or all of the findings and conclusions of the Administrative Law Judge in said decision; that the Plaintiff will attach as Exhibit "B" to this Complaint a copy of said decision when it is issued by said Board.

XII.

That the Defendant INTERNATIONAL BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, through its duly elected and appointed officials, officers, and agents, were aware of and had

full knowledge of the illegal boycott activities in which its local affiliate, Defendant LOCAL 112, had engaged, in various litigation and strike activity which was reviewed by the National Labor Relations Board at various times in various cases before that agency; That the said Defendant INTERNATIONAL UNION sanctioned, allowed, and permitted its local affiliate to engage in a course of activity and conduct against the Plaintiff when it knew, or by exercise of reasonable diligence should have known, that said LOCAL UNION was engaging in acts and conduct which were violative of Section 8(b)(4) of the National Labor Relations Act; that said Defendant INTERNATIONAL UNION had within its authority, power, and discretion the ability to use reasonable means to prevent and terminate said illegal activity of its local affiliate, and by virtue of its failure to utilize reasonable means and methods to prevent and terminate such illegal activity it allowed, acquiesced in and condoned the illegal activities of said LOCAL UNION, which were all directed towards the Plaintiff.

XIII.

That as a result of the actions of the Defendants, and each of them, the Plaintiff, who was, and is, engaged in an industry and activity affecting commerce within the meaning of the National Labor Relations Act, was injured in its business and property by reason of violation of Section 303(a) of the National Labor Relations Act, and suffered damages as a result of said violation, to-wit: That Plaintiff was required to hire attorneys to obtain injunctive relief in the federal courts, and to

seek relief and a cease-and-desist order from the National Labor Relations Board, and thereby incurred attorneys' fees and costs necessarily expended in obtaining said remedies, in the sum of $11,573.95; That Plaintiff's plant manager, Eugene Spolar, was forced and required to expend substantial amounts of his time and effort in the judicial and administrative remedies sought by the Plaintiff, and Plaintiff was injured thereby in the sum of $5,000.00; That Plaintiff suffered loss of business opportunities and had interruptions and delays in his manufacturing process by virtue of the illegal picketing which was engaged in by the Defendants, and Plaintiff was injured thereby in the sum of $5,000.00.

WHEREFORE, Plaintiff prays for judgment as follows:

(1) For damages in the sum of $21,573.95; and

(2) For costs of suit and attorneys' fees in the prosecution of this action; and

(3) For all other relief which the Court in the premises deems equitable, just, and proper.

DATED this 25 day of September, 1974.

POORE, McKENZIE, ROTH,
ROBISCHON & ROBINSON
By DONALD C. ROBINSON
Attorneys for Plaintiffs
SUMMIT VALLEY INDUSTRIES, INC.
400 Silver Bow Block
Butte, Montana 59701

APPENDIX E

(Docket Entry 5)

ANSWER AND CROSS COMPLAINT

(Filed November 27, 1974)

COME NOW Defendants Local 112, United Brotherhood of Carpenters and Joiners of America, hereinafter "Local 112", and James Cadigan, and each of them, and herewith Answer Plaintiff's Complaint as follows:

I.

Admit paragraphs I and II.

II.

Deny paragraphs III, V, VI, VIII, IX, X, XI, XII, and XIII.

III.

In Answer to paragraph IV of Plaintiff's Complaint, said Defendants admit a portion thereof, to-wit:

> "That the Defendant, Local 112, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA is a labor organization within the meaning of Section 2 (5) of the National Labor Relations Act and has its principal offices at Butte, Montana; that the Defendant JAMES CADIGAN is a duly elected official, officer and agent of the said Union and at all times material hereto engaged in acts and conduct on behalf of said Union in this judicial district . . ."

and deny the balance of said paragraph.

IV.

Admit the following portion of paragraph VII:

"That on or about October 11, 1972, at Butte, Montana, and continuing for several days . . . thereafter, until enjoined by an Order of this Court, the Defendants began picketing a modular home located near the entrance to Plaintiff's manufacturing plant with a placard which read as follows:

'NOTICE TO THE PUBLIC
THIS EMPLOYER DID NOT EMPLOY MEMBERS OF CARPENTERS UNION IN THE WORK PERFORMED ON THIS BUILDING
LOCAL 112, CARPENTERS UNION AFL-CIO'"

and deny the words "and weeks" (line 15) of said paragraph VII.

SAID answering Defendants and Cross Claimants, by way of CROSS COMPLAINT, allege as follows:

I.

That this Court has jurisdiction of the action of the parties by virtue of Section 301 of the Labor Management Relations Act of 1947, as amended and RCP Rule 13(g).

II.

That on or about the 20th day of August, 1971, Defendant Local 112 entered into a Collective Bargaining Agreement with Silver Bow Employers' Association and Butte Contractors' Association, herein "Association Agreement".

III.

That Thomas Lutey at all times material herein was doing business as Lutey Construction, hereinafter "Lutey"; William Perusich at all times material herein was doing business as Perusich Construction, hereinafter "Perusich", and Eugene Spolar at all times material herein was doing business as Spolar Construction, hereinafter "Spolar", and were members of said Butte Contractors' Association and thereby became bound to Association Agreement.

IV.

That Frank Jovick at all times material herein was doing business as Jovick Construction, hereinafter "Jovick", and on or about the 1st day of May, 1972, executed an Agreement thereby binding himself to the provisions of said Association Agreement. Thereafter, Lutey, Perusich, Spolar and Jovick with knowledge of the conditions and terms of said Agreement performed labor and work in violation of said Argument.

V.

On and after the 22nd day of May, 1972, Defendant and Cross Claimant, James Cadigan, acting on behalf of Defendant Local 112, gave notice to and made demand upon said Cross Defendants Lutey, Perusich, Spolar and Jovick to cease performing work in violation of said Association Agreement. Despite said demands, said Cross Defendants failed and refused to cease the work that was in violation of the Contract.

VI.

As a proximate cause of Cross Defendants', Lutey, Perusich, Spolar and Jovick, violation of said Association Agreement and Defendant and Cross Claimant Local 112's enforcement thereof, Defendant and Cross Claimant Local 112 has been required to defend itself against unfair labor practice charges before the National Labor Relations Board and a claim for damages in the within case and has been required to employ legal counsel at the reasonable value of attorney services in the sum of $35,000.00.

WHEREFORE, Defendants and Cross Claimants, Local 112 and James Cadigan, pray for an Order and Decree of this Court as follows:

One. Demand that Plaintiff's Complaint be dismissed against Defendants Local 112 and James Cadigan and Defendants Local 112 and James Cadigan have judgments against Plaintiff for its costs and disbursements;

Two. Should Plaintiff's Complaint not be dismissed, Local 112 and James Cadigan have judgment against Cross Defendants, Lutey, Perusich, Spolar and Jovick, for the sum of money awarded Plaintiff in this action, if any;

Three. Defendants and Cross Claimants, Local 112 and James Cadigan, have judgment against Cross Defendants, Lutey, Perusich, Spolar and Jovick, and each of them, for the sum of Thirty-Five Thousand and no/100 ($35,000.00) Dollars and for their costs and disbursements.

Four. For all other relief which the Court in the premises deems equitable, just and proper.

Of Attorneys for Defendants and
Cross Claimants,
Local 112 and James Cadigan
By: PAUL T. BAILEY
2308 First National Bank Tower
Portland, Oregon 97201
Telephone: 503-221-0870

BY: ROBERT J. HOLLAND
2101 Harrison Avenue
Butte, Montana 59701
Telephone: 406-792-0413

Service of the above and foregoing Answer and Cross Complaint is hereby acknowledged and true copy thereof received this 27 day of November, 1974.

DONALD C. ROBINSON
Attorney for Plaintiff

APPENDIX F

(Docket Entry 55)

PRELIMINARY PRETRIAL ORDER

(Filed Dec. 18, 1975)

IT IS ORDERED that the Plaintiff will, within the time previously granted, file its reply brief on the collateral estoppel issue and will at the same time respond to defendants' brief on the defendants' cross-claim.

All discovery shall proceed as to all interrogatories,

requests for admissions, and requests for production of documents, and the responses thereto, without regard to the solution of the motions relating to collateral estoppel.

All deadlines for discovery are revoked. I am satisfied that there is not now any collateral estoppel or res judicata doctrine available to plaintiff, although I am now inclined to think that when the Board order is passed upon by the court of appeals and the Supreme Court, the doctrine of collateral estoppel or res judicata will be available to one or the other of the parties. When the court of appeals order becomes final I will decide the matter by an opinion.

The case will not be tried until the Board order has become final or is vacated. I have decided on this course because I do not think that a legal system should produce different results for the same parties on identical facts simply because of a difference in the fact-finders and that where possible the courts should try to avoid the results obtained in the *Brick & Clay Workers* cases, 198 F.2d 637 and 198 F.2d 645 (6th Cir. 1952).

Counsel are directed to cease using letters addressed to the court as a substitute for motions.

DATED this 16th day of December 1975.

RUSSELL E. SMITH
United States District Judge

APPENDIX G
(Docket Entry 64)
OPINION AND ORDER
(Filed July 20, 1978)

I am of the opinion that the decision of the National Labor Relations Board to the extent that it was affirmed and enforced in *Chamber of Commerce of the United States v. NLRB,* No. 75-2064, and *Summit Valley Industries, Inc. v. NLRB,* No. 75-2166, and *United Brotherhood of Carpenters & Joiners Local 112 v. NLRB,* No. 75-2770 (9th Cir., filed Mar. 8, 1978), collaterally estops Local 112, United Brotherhood of Carpenters & Joiners, but not James Cadigan. The plaintiff shall file a motion for partial summary judgment and a proposed order granting the same within twenty (20) days. Within the same time both parties shall file briefs indicating the issues remaining and the method of trial as to Cadigan.

The reasons for this order are these: A party to an administrative hearing which affords due process is collaterally estopped from contesting the issues determined in the administrative hearing in a court proceeding (*United States v. Utah Construction & Mining Co.,* 384 U.S. 394 (1966)) if there was substantial evidence to support the fact-finding. *Paramount Transport Systems v. Chauffeurs Local 150,* 436 F.2d 1064 (9th Cir. 1971); *Mead v. Retail Clerks Local 839,* 523 F.2d 1371 (9th Cir. 1975); *Purvis v. Great Falls Building & Construction Trades Council,* 266 F.Supp. 661 (D. Mont. 1967). When a circuit court affirms and enforces an order of the National Labor Relations Board, it adjudicates the sufficiency of the evidence before the Board, and a party to the enforcement proceeding is collaterally

estopped from contesting the sufficiency of that evidence. *See Mine Workers Local 15 v. Eagle-Picher Co.*, 325 U.S. 335 (1945).

Defendants assert that there is not a complete identity of parties in the cases before the National Labor Relations Board and the Ninth Circuit and in the present case. There were parties before the National Labor Relations Board not present here. The record shows that a consolidated complaint was filed before the National Labor Relations Board. A consolidated hearing was held, and a consolidated order affecting all cases was issued. The dispute between the plaintiff here and the defendant local union was squarely presented. There is as between the plaintiff and defendant local union complete mutuality.[1] The lack of a complete identity is not important as to the local union.

On the authority of *Shore v. Parklane Hosiery Co.*, 565 F.2d 815 (2d Cir. 1977), the argument that the application of the doctrine of collateral estoppel will deny the defendant local union a jury trial is rejected.

DATED this 19th day of July 1978.

RUSSELL E. SMITH
United States District Judge

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[1]This is not required. See 1B Moore's Federal Practice—¶0.412 (2d ed. 1974, and 1977-78 supp.)

APPENDIX H
(Docket Entry 71)
ORDER GRANTING PARTIAL SUMMARY JUDGMENT
(Filed Oct. 12, 1978)

A motion having been made by the Plaintiff herein for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure in the Plaintiff's favor granting the relief demanded in the complaint on the ground that there is no genuine issue as to any material fact and that the Plaintiff is entitled to judgment as a matter of law.

Now, in considering the pleadings in this action, and the decisions, orders and judgments of the National Labor Relations Board in *United Brotherhood of Carpenters and Joiners, Local 112 (Summit Valley Industries, Inc.),* 217 NLRB No. 129 (1975), affirmed and enforced by the Ninth Circuit Court of Appeals in *Chamber of Commerce of the United States vs. NLRB,* No. 75-2064, *Summit Valley Industries, Inc., vs. NLRB,* No. 75-2166, and *United Brotherhood of Carpenters and Joiners Local 112 vs. NLRB,* No. 75-2770 (9th Cir., filed on March 8, 1978 and judgment thereon filed on May 15, 1978), which decisions, orders and judgments this Court has determined to be *res judicata* and determinative of the issues of liability of United Brotherhood of Carpenters and Joiners Local 112; and the Court having concluded that said decisions, orders and judgments collaterally estop said Defendant from disputing its liability for damages to the Plaintiff under Section 303(a) of the Labor-Management Relations Act, 29 U.S.C. §§141, *et seq.*; and the Court having found that there is no

genuine issue as to any material fact except as to the amount of damages, and having concluded that Plaintiff is entitled to judgment as a matter of law for such amount as shall be found to be due it as damages.

IT IS ORDERED, ADJUDGED AND DECREED, and this does order, adjudge and decree, that:

1. Summary judgment be entered in favor of the Plaintiff Summit Valley Industries, Inc., and against the Defendant United Brotherhood of Carpenters and Joiners of America, Local 112, for such amount as may be due the said Plaintiff Summit Valley Industries, Inc., as damages; and

2. That this cause be placed on the calendar for trial on the sole issue of damages.

DATED this 10th day of October, 1978.

RUSSELL E. SMITH
United States District Judge

APPENDIX I.

IN THE NINTH CIRCUIT COURT OF APPEALS
SUMMIT VALLEY INDUSTRIES, INC.,
a Montana corporation,
Plaintiff and Appellant,

vs.

LOCAL 112, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA,

and JAMES CADIGAN, its Agent,
Defendants and Respondents.

DOCKET NO. 79-4673 & 79-4663

FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BUTTE DIVISION

HEARD BEFORE
Honorable Russell E. Smith, U. S. District Judge, For the District of Montana, Missoula Division

TRANSCRIPT OF PROCEEDINGS

Reported by Carroll B. Copeland, CSR, RPR, Official-Freelance Court Reporter and Notary Public, State of Montana
Residing in Missoula, Montana

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BUTTE DIVISION
SUMMIT VALLEY INDUSTRIES, INC.,
a Montana corporation,
Plaintiff,

vs.

LOCAL 112, UNITED BROTHERHOOD OF CARPENTERS, AND JOINERS OF AMERICA, and JAMES CADIGAN, its Agent,

Defendants,

No. 74-121-BU

and

LOCAL 112 UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, and JAMES CADIGAN, its Agent,

Cross Claimants,

vs.

THOMAS LUTEY, d/b/a Lutey Construction; WILLIAM PERUSICH, d/b/a Perusich Construction; EUGENE SPOLAR, d/b/a Spolar Construction; and FRANK JOVICK, d/b/a Jovick Construction,

Cross Defendants.

Taken in the United States Court House
Butte, Montana
August 6, 1979

TRANSCRIPT OF PROCEEDINGS

Reported by Carroll B. Copeland, C.S.R., R.P.R., Official-

Freelance Court Reporter and Notary Public, State of Montana, Residing in Missoula, Montana.

APPEARANCES

DONALD C. ROBINSON, ESQ. and DAVID J. WING, ESQ., of the firm Poore, Roth, Robischon & Robinson, Esqs., 1341 Harrison Avenue, Butte, Montana, appearing on behalf of the Plaintiff.

ROBERT J. HOLLAND, ESQ., of the firm Sullivan & Holland, Esqs., 2101 Harrison Avenue, Butte, Montana, and

PAUL T. BAILEY, ESQ., 5441 S.W. Macadam Avenue, Portland, Oregon, appearing on behalf of Local 112, United Brotherhood of Carpenters and Joiners of America.

JOHN L. PETERSON, ESQ., of the firm McCaffery & Peterson, Esqs., 27 West Broadway, Butte, Montana, appearing on behalf of Frank Jovick, d/b/a Jovick Construction.

INDEX

NAME OF WITNESS: PAGE NO.

MR. EUGENE E. SPOLAR

Direct Examination by Mr. Robinson 7

MR. DONALD C. ROBINSON, ESQ.

Direct Examination by Mr. Wing 30

CERTIFICATE OF COURT REPORTER 39

PLAINTIFF'S EXHIBITS

#	Description	Offered	Admitted
1	Summary of Expenses	20	23
2	Letter dated 2-26-73	4	5
3	Letter dated 12-27-73	4	5
4	Letter dated 9-26-74	4	5
5	Letter dated 2-15-79	4	5
6	Letter dated 7-10-79	4	5
7	Summary of Attorney's Fees & Expenses	4	5
8	Breakdown of Attorney's Fees & Expenses by Proceeding	4	5

AUGUST 6, 1979

THE COURT: This case is set for trial, Summit Valley Industries versus Local 112, United Brotherhood of Carpenters and Joiners of America.

The first order of business, the Court now dismisses this action as to the Defendant James Cadigan.

I'm advised, gentlemen, that there are stipulations as to the reasonable value of the attorneys' fees extended in the 303 proceeding; is that correct?

MR. ROBINSON: In the NLRB related proceedings, not the 303 proceedings.

MR. BAILEY: He has prepared a series of exhibits, 2, 3, 4, 5, 6, 7 and 8, Plaintiffs, which I would stipulate to, that established that the attorneys' fees incurred amounts to $12,584.65. Related expenses, such as telephone calls, telegrams, et cetera, $1,019.68 for a total of all attorneys' fees and related expenses in the amount of $13,604.33, as legal fees and expenses incurred in the prosecution of the NLRB proceedings.

THE COURT: Very well.

MR. ROBINSON: At this time, Your Honor, I would like to submit the exhibit list to the Court, if I may.

THE COURT: Very well. Have you looked at these exhibits, Mr. Bailey?

MR. BAILEY: Yes, I have, Your Honor.

THE COURT: Are there any objections to any of them?

MR. BAILEY: I take objection to #1. I do not make objections to any of the others.

THE COURT: Very well, the Exhibits numbered #2, 3, 4, 5, 6, 7 and 8 are admitted.

MR. ROBINSON: At this time, Your Honor, I'd like to file a motion with the Court to amend by interlineation certain references to damages in the Complaint.

As to paragraph number thirteen, referring to attorneys' fees and costs necessarily expended, a line number twenty-nine, page number five of the Complaint, strike the figures and numbers $11,573.95 and insert in lieu thereof the figures and numbers $13,604.33.

THE COURT: So ordered.

MR. ROBINSON: As to paragraph number thirteen, referring to the lost time of the plant manager, Gene Spolar, at line number one, page number six of the Complaint, strike the figures and numbers $5,000.00 and insert in lieu thereof the figures and numbers $3,675.00.

THE COURT: So ordered.

MR. ROBINSON: As to paragraph number thirteen, referring to loss of business opportunities and interruptions and delays, at line number two, page number six of the Complaint, strike all of the words and lines two through six thereof.

THE COURT: So ordered.

MR. ROBINSON: As to the prayer for damages: (a) as to paragraph (1), on line number nine of page number six of the Complaint, strike the numbers and figures $21,573.95 and insert in lieu thereof the numbers and figures $17,279.33.

THE COURT: 217 —

MR. ROBINSON: $17,279.33, that being the total of the items referred to above.

THE COURT: So ordered.

MR. ROBINSON: Thank you. We call as our first witness, Gene Spolar.

MR. BAILEY: I was going to ask if it would be proper if I were to suggest that we had agreed to waive the jury and stipulated to that.

THE COURT: Yes, let the record show that the parties in chambers waived trial by jury in this case and stipulated that it might be tried to the Court.

Thereupon,

MR. EUGENE E. SPOLAR

a witness of lawful age, having been first duly sworn to tell the truth, the whole truth and nothing but the truth, testified upon his oath as follows:

DIRECT EXAMINATION

BY MR. ROBINSON:

Q State your name, please?

A Eugene E. Spolar.

Q What is your address?

A 390 Holmes Avenue.

Q In Butte, Montana?

A Yes.

Q What is your profession or occupation?

A Plant manager of Summit Valley Industries.

Q How long have you been the plant manager of Summit Valley Industries?

A A little over seven years.

Q How long has Summit Valley Industries been in operation?

A A little over seven years.

Q Have you been the manager since its inception in that business?

A Yes.

Q And the business began approximately June of 1972; is that correct?

A Yes.

Q Summit Valley, of course, is a Montana corporation?

A Yes.

Q Are you a stockholder and director of the corporation?

A Yes.

Q Is your wife also involved in the corporation?

A Yes.

Q In what capacity?

A She's secretary-treasurer.

Q And is your oldest son, Chris Spolar, involved in the operation of the plant?

A Yes.

Q What is his capacity?

A I think he is president.

Q All right. Does he also work full-time with the company?

A Yes.

Q What is the nature of the business of Summit Valley Industries?

A We build modular housing.

Q You began constructing modular homes in your plant in June of 1972?

A Yes.

Q What was your previous experience, Gene?

A I had started to be a carpenter when I was seventeen years old.

Q Speak up so that the Court can hear you.

A I started in carpentry at seventeen.

Q What did you do thereafter?

A I worked for approximately, as a carpenter, for ten years and then went general contracting.

Q You were self-employed as a general contractor?

A Yes.

Q How long were you self-employed as a general contractor?

A For about four years.

Q Did you, at any time, manage an operation similar to the operation you are now running?

A Yes.

Q What was that?

A I went to work in Livingston, Montana building trailer houses.

Q What was your —

MR. BAILEY: It would be helpful if we had years and dates on these particular things.

Q (By Mr. Robinson) What was your capacity in the trailer factory?

A Night manager.

Q Can you tell us when that occurred?

A I believe it was in 1970.

Q All right.

A I'm not sure about that.

Q When were you a general contractor?

A In 1958 (sic) until about 1972, looking at the time that I went to work in Livingston.

Q 1958 or 1968?

A 1968.

Q 1968 to 1972?

A Yes.

Q How many employees worked for Summit Valley Industries in the time frame of October of 1972, when the picketing began?

A I would estimate between nine and twelve.

Q What has been the average number of employees that you have employed during this last period?

MR. BAILEY: I object to the time frame. I think the only time frame is that month.

THE COURT: Overruled, it's before the Court. You may answer.

A Would you repeat the question again?

Q (By Mr. Robinson) Generally, how many employees have you employed during the past seven years? You indicated nine to twelve in the latter part of 1972; is that correct?

A I would say that it would average out around ten.

Q All right. Now, on or about October 11, 1972, did you have an occasion to retain our law firm in connection with the labor difficulty?

A Yes.

Q And would you describe to the Court the situation that caused you to retain us?

A I went to work one morning and there was pickets in front of the job site, in front of the plant building.

Q Did you also ascertain on or about that time that there had been problems with local carpenters who were members of the union doing certain work at the site of the homes which the modular homes had been placed?

A They were trying to get the on-site contractors not to do the work.

Q And these on-site contractors were members of the Carpenters Union?

A Yes.

Q What do you mean by on-site work?

A Well, there has to be a foundation built for the house. After the house is delivered, they have to have stoops and foundations, stoops and sidewalks.

MR. BAILEY: If it please the Court, this area has already been litigated. I think that we are only talking about the damage factor.

MR. ROBINSON: This is by way of —

THE COURT: I think that it has.

MR. ROBINSON: This is by way of a brief background.

Q (By Mr. Robinson) How long did the picketing occur?

A I believe that it was for approximately three days. I'm not positive.

Q Well, did it occur on and off for over a month period of time until the injunction was issued?

A Sporadically, yes.

MR. BAILEY: That is a leading question, counsel.

THE COURT: What was the objection?

MR. BAILEY: It is a leading question.

THE COURT: Overruled.

Q (By Mr. Robinson) Would you generally describe the legal actions that were taken on your behalf?

A I had called the firm and they sent you down. We had went to Helena and got an injunction to have the pickets stopped.

Q Were unfair labor practices filed with the NLRB?

A Yes.

Q And were they filed on or about the first day of the picketing?

A I believe it was filed the first day.

Q And after the injunction was issued in Helena, was any efforts, was any work undertaken in connection with a 10K proceeding, work jurisdiction dispute proceeding?

A I don't understand.

Q Do you recall participating on a two-day hearing in November of 1978, involved called a 10K hearing?

A Yes.

Q And were there further hearings before the Ad-

ministrative Law Judge, the National Labor Relations Board?

A After that?

Q Yes.

A After that 10K hearing, yes. I believe there was one more in this building.

Q And then was there an appeal to the National Labor Relations Board in Washington, D.C. of his decision?

A Of the decision of —

Q Of the Administrative Law Judge?

A Yes.

Q And subsequently, there was an appeal of that decision to the Ninth Circuit Court of Appeals?

A Yes.

Q And what was the result of all of these proceedings?

A The result?

Q Yes.

A The carpenters were found to have illegal pickets.

Q And did you firm prevail at every level of the proceedings?

A Yes.

Q Now, were you personally required to be away from your business to be involved in these various proceedings and litigation?

A Yes.

Q Please describe the time that you were required to spend in this matter, Gene, which caused you to be away from the plant.

First of all, I'm going to take you through the various steps of the proceedings.

When charges were initially filed in October of 1972, did you participate in interviews with NLRB attorneys and agents?

A Yes.

Q And how much time did you spend with them, just generally?

A We figured it out. I do not have it memorized.

Q All right. Did you spend a substantial amount of time with them in being interviewed?

A Yes.

Q Showing them the plant?

A Yes.

Q And then did you have interviews with your own attorneys regarding the matter?

A Yes.

Q How about the injunction proceedings; what did that involve in terms of your time?

A I had to go to Helena and spend a day up there.

Q All right. And the 10K hearing, what was involved there in terms of your time?

A I believe it was two or three days that we spent in Court.

Q All right. And the hearings before the Administrative Law Judge, do you recall how many days of hearings there were there?

A I think it went on for the better part of a week, on and off.

Q The statement of your attorneys indicates that there were twelve full days of hearings and three and a half days of hearings; would that refresh your memory as to the amount of time that was involved with the hearings?

A Yes.

Q And did you attend most of those hearings?

A Most of the time I attended. There was a few days that I did not attend. The majority of the time I did.

Q Now, did you consult with attorneys with the NLRB, your own attorneys and other attorneys prior to all of these hearings?

A Yes.

Q National Labor Relations Board?

A Yes.

Q And during the course of the litigation, were you required to consult with your attorneys and to read decisions and Court rulings from the attorneys as to the status of the litigation?

A Yes.

Q Could you describe to the Court the volume of papers that were received by you and that you were required to read through?

A The one decision, I believe it was from the 10K hearing, I can remember spending four nights reading it.

Q Would that have been the Administrative Law Judge's decision?

A Yes.

Q Gene, did you, along with your attorney, sit down and work up an itemization of the various time loss from your production activity during your participation in this litigation?

A Yes.

Q I'm handing to you what has been marked for identification as Plaintiff's Exhibit #1 and ask you if you can identify that document?

A This is the time that I have spent on this total time.

Q Does this Exhibit fairly and accurately set forth the various hearings and litigation efforts which you were personally required to take part in and spend time in?

A Yes.

MR. ROBINSON: I move admission of Plaintiff's Exhibit #1.

MR. BAILEY: By way of voir dire, may we ask a couple of questions?

THE COURT: Yes, you may.

Q (By Mr. Bailey) The document in front of you, Mr. Spolar, can you put times in respect to those particular a, b, c, d, e, and f; can you tell us what period of time they occurred?

A What period of time they occurred?

Q Yes, For example, a —

A I couldn't without going down through my time records.

Q Well, was that a before or after the injunction?

A a would be after the injunction.

Q That would be after the injunction through your, you say 56 hours; is that right?

A Yes.

Q On b, you list three days of administrative hearings, four hours a day. That is after, as well?

I'm talking about after the injunction?

A After the injunction in Helena?

Q Yes.

A Yes.

Q And you have one day injunction hearing in Helena?

A Yes.

Q That's when the injunction was granted?

A Yes.

Q Now, you stated thirty hours of pre-trial preparation with attorneys and NLRB proceedings. Are you now talking about the pre-trial in Helena or are you talking about the administrative hearing pre-trial?

A I think this would be a total of time that I spent. Part of that, I believe, was before the injunction.

Q How much of that?

A No, I think it was all after the injunction.

Q All after the injunction?

A Yes.

Q Now it's clear, I presume on the e that says that that was in relation to the 10K hearing. That would be after the injunction?

A Yes.

Q And then the last item you have estimated was miscellaneous time. Do you have a time work frame on that?

A I don't understand what you want.

Q Well, you said estimate, miscellaneous time and I'm trying to find out whether these times occurred before the injunction or after the injunction.

A It was after the injunction.

MR. BAILEY: The document also contains a rate of dollars that I don't think yet has been established and I think that I would object specifically on that basis.

MR. ROBINSON: Let me go through and first I will withdraw my offer.

THE COURT: Very well.

Q (By Mr. Robinson) Gene, at the bottom of the Exhibit, it states total hours, 147 hours, totaling all of these proceedings at the hourly rate of $25.00 per hour or for a total of $3,675.00

Now, with regard to the value placed on your time, how did you arrive at $25.00 per hour as a reasonable value of your time?

A At that time, the shop rate for a carpenter was approximately $15.00 an hour.

Q All right.

A I had approximately ten employees. We were setting up a new building procedure and I felt conservatively estimating I lost at least $10.00 per hour in production by not being there.

Q And what did you estimate was your total hourly rate for production cost, labor, overhead?

A Total what?

Q Your total hourly amount expended in production costs totaling all employees?

A All employees at the plant?

Q And all other related production costs at a minimum?

A I would say that we were looking at close to $90.00 to $100.00 an hour with payroll, taxes, fringe benefits.

Q All right. And your figure of $10.00 per hour is about a 10% slippage you estimate of loss production?

A Yes.

Q So you arrive at 25 by $15.00 an hour, which was the shop rate of a carpenter?

A A carpenter.

Q Plus $10.00 an hour for a loss production because of lack of supervision?

A Yes.

MR. ROBINSON: We move admission of Plaintiff's Exhibit #1.

MR. BAILEY: May I have some more voir dire on that?

THE COURT: All right.

Q (By Mr. Bailey) Mr. Spolar, you were the manager of the company at this time?

A Yes.

Q And you had just, I think that your direct testimony said that you had been a carpenter, as a journeyman carpenter up until the time that you started?

A A journeyman carpenter and contractor.

Q Beg your pardon?

A A journeyman carpenter and contractor.

Q Do you know what the journeyman carpenters rate was in 1972?

A In 1972, do I know what it was?

Q Yes.

A I can give you a rough estimate.

Q If I give you a document that advises you the master agreement with the Carpenters Union 112 in Butte for the period May 1, 1972 to April 30, 1973; would you be able to tell from that?

A Yes.

MR. BAILEY: May I approach the witness?

THE COURT: Yes.

Q (By Mr. Bailey) Look on page number three thereof.

A $5.87 an hour.

Q You stated earlier that the shop carpenter was $15.00. Is the shop carpenters rate that much higher than a journeyman carpenter's rate?

A Well, by the time you send a man out on the job, it was $15.00 an hour.

Q Weren't you actually working the people there in the plant at less than the rate that I just quoted you here?

MR. ROBINSON: We will object. That is irrelevant to any issue.

MR. BAILEY: I'm trying to set the rate that is a value.

THE COURT: Overruled, go ahead.

A Do I answer the question?

Q (By Mr. Bailey) Yes.

A Some employees were working for less than that and some employees were working for more than that.

THE COURT: What was the journeyman rate?

MR. BAILEY: $5.87 an hour.

Q (By Mr. Bailey) You were employed in this plant as general manager?

A Yes.

Q What was your salary?

A What was my salary?

Q Yes.

A I believe it was around, including everything, fringe benefits and everything, was around $2,000.00 a month.

Q Around $2,000.00 a month?

A Yes.

Q During the time that you were absent from the plant for these purposes that you have referred to earlier by Mr. Robinson, did the plant employ any replacement for you for those hours?

A Did the plant employ any replacement for me?

Q Yes.

A No, there was no way that we could. We couldn't find anybody to replace me.

Q How would the plant have lost these dollars? I'm talking about not you personally, but the plant lost these dollars that you are testifying to here if they didn't replace you?

A How did the plant?

Q Yes, how would your employer lose the dollars if they had no replacement for you?

A The loss of production.

Q Let me ask you, did you work in production on the plant?

A Did I work in production?

Q Yes.

A No, in supervision.

Q Did you have to work overtime to collect money for that supervision because of being absent?

A I worked overtime. I didn't get paid for it because I believe I was on salary.

Q So there was no cost to the company?

A No.

MR. BAILEY: I would object to the setting of that figure.

THE COURT: Overruled. Exhibit #1 is admitted.

Q (By The Court) How many hours a week did you work?

A How many hours per week did I work?

Q Yes.

A I worked as high as 96 hours in one week.

Q What would it average out?

A I would say that I averaged at that period of time, I was averaging at least 60 hours a week.

THE COURT: Okay.

Q (By Mr. Robinson) Gene, Mr. Bailey just asked you about the rate of carpenters and gave you a wage rate in 1972. Do you know that there were additional number of other required benefits that had to be paid to a carpenter?

A I believe there was a vacation plan. You have to look in there to find out. It was old age, a pension, and there was also health and welfare. I don't — that I know for sure, there could be other things that are in there that I did not know about.

Q All right. Social Security tax?

A Yes.

Q Did you make bids on jobs just prior to 1972? Did you, as a self-employed contractor, bid on jobs?

A Yes.

Q And do you know what the standard hourly shop rate was for purposes of submitting bids by a contractor in the Butte, Montana area at that time?

A At that time, I believe most contractors were figuring $15.00 an hour. Some of them as high as $18.00 an hour.

Q All right. And when we talk about a shop rate versus just the wage and fringe benefit rate, why do you have a difference? Why is the shop rate higher than an hourly rate plus the benefits of the carpenter?

A Because you have to supply a certain amount of items. You have to have a certain amount of equipment and you have got payroll incurred, payroll costs, such

as accountant fees, paying into Social Security, Industrial Accident, Unemployment Insurance, Federal Unemployment Insurance.

Q If you had been submitting a bid for your own work as a self-employed contractor in 1972, what would have been your rate bid?

A Hourly rate bid?

Q Yes.

A It would be $15.00 per hour.

Q Now, what do you mean by loss of production?

You have estimated $10.00 per hour was lost. Could you in some detail explain to the Court why during your absence there was a loss of production on your assembly line?

A Well, we were just in the process of getting the assembly, these houses started and basically, it was my idea down there to start it. So nobody really knew when they would get in a bind, such as if they ran into a problem, they just would not know how to overcome it.

Q At the time of this particular thing, what was the stage of your corporation? Could it more or less run in your absence with just a foreman in charge?

A Up to a certain point, and then it would just bog down.

Q Did you return from some of these Court appearances and various litigation efforts and discover that, in fact, there had been down time and loss production and, if so, could you give an example?

A Definitely. I can remember one specific time where we were building a house with the reverse floor plan and the house was started without reversing the floor plan. If I would have been there, I would have caught that.

Q What was required then?

A What was required?

Q Yes.

A Run the house out the door and set it up and hope that you can sell it and the customer that had the house waited one extra month for his house.

Q Do you feel that the production loss due to your absence and expenditures and time equal $3,675.00?

A I think that's a conservative estimate.

THE COURT: Well, isn't there a stipulation that we are talking about the reasonable value of his services?

Isn't that the thing that we are trying here?

MR. ROBINSON: Yes.

THE COURT: The reasonable value of his services and the loss of that?

MR. BAILEY: To the company.

THE COURT: Yes.

Q (By Mr. Robinson) Now, I want you to address the matter of how necessary it was for you to obtain legal services and protection of the act?

MR. BAILEY: Is this in furtherance of this point?

MR. ROBINSON: No, I'm leaving the point.

MR. BAILEY: You are leaving the point and going to something else?

MR. ROBINSON: Yes.

A Don, could you restate that question, please?

Q (By Mr. Robinson) I want you to turn for a moment to the matter of the necessity of your obtaining legal services and protection under the National Labor Relations Act.

Do you have an opinion as to what the statuts of your business would be today if the legal proceedings had not been undertaken and had not been pursued?

* * *

MR. BAILEY: That has already been litigated and stipulated as far as the attorneys' fees are concerned. That's what we are talking about.

MR. ROBINSON: Your Honor —

THE COURT: What is the purpose of it?

MR. ROBINSON: Well, this is, we will establish for the record, Your Honor, that the witness would testify that but for the legal proceedings and the efforts of his attorneys, the plant would never have been in business, would not have been in business at this time if the picketing had been allowed to continue.

MR. BAILEY: The response to that, Your Honor, is that a National Labor Relations Board procedure, followed up by the NLRB and that's already been litigated and the Board is the one that went after the

injunction and got it. I don't understand why counsel is trying to relitigate that case.

MR. ROBINSON: I think counsel misunderstands what I'm trying to do. That's not what I'm trying to do. We all know what the results was. What we are talking about is the impact that resulted on the business, whether this business, whether this was just a slight inconvenience to the business or whether it was a substantial interruption or whether it was a protection that absolutely saved the business.

MR. BAILEY: If the Court please, on that point, I may remind counsel that he had waived in Court and on the record here the third point that we are talking about now and that is only damage under the business other than Mr. Spolar's absence in it.

THE COURT: Well, he is not trying to prove damages as I understand it. All he is trying to say is that it was necessary to hire a lawyer to get the picketing stopped.

MR. ROBINSON: That's what I'm trying to prove.

THE COURT: That's wht I would find anyway.

MR. BAILEY: I think we were talking about Mr. Spolar's absence, what the reasonable value was.

THE COURT: I think all he is trying to prove is that in order to get the picketing stopped and the other interferences, he had to hire lawyers. So go ahead.

Q (By Mr. Robinson) Okay. What was your opinion, Gene?

A If I didn't contact you?

Q Yes.

A We wouldn't have had no business. We wouldn't have had, and in that respect, we would have had no customers to buy our product because nobody would cross that picket line to buy a house from us.

Q Is that based upon your experience in observing the response to the public to picket lines in Butte, Montana?

A It was my experience when we had the pickets two days.

Q Now, was your business charged legal fees for the efforts of the attorneys on your behalf?

MR. BAILEY: Objection. We stipulated to the value of that.

THE COURT: Sustained.

MR. ROBINSON: At this time, we will offer plaintiff's Exhibits #2, 3 —

THE COURT: They are all admitted.

MR. ROBINSON: 4, 5, 6, 7 and 8.

THE COURT: I have heretofore admitted the Exhibits.

MR. ROBINSON: I meant to bring them to the Court.

I have no further questions.

MR. BAILEY: I have no questions.

(Witness excused.)

MR. ROBINSON: May we have a moment, Your Honor?

Thereupon,

MR. DONALD C. ROBINSON, ESQ.

a witness of lawful age, having been first duly sworn to tell the truth, the whole truth and nothing but the truth, testified upon his oath as follows:

DIRECT EXAMINATION

BY MR. WING:

Q State your name for the record, please?

A Donald C. Robinson.

Q And what is your address, both personal and business?

A My home address is 3505 Willaby, Butte, Montana; my business address is 1341 Harrison Avenue, Butte, Montana.

Q What is your profession or occupation?

A An attorney.

Q And with whom are you associated?

A I am with the firm of Poore, Roth, Robischon & Robinson.

* * *

Q Could you describe your educational background and legal experience?

A I received my bachelor's degree from the University of Montana in 1963. I received my LLB from

George Washington University, Washington, D.C., 1967. I was in the Public Defender's Office in Washington, D.C. for approximately —

THE COURT: The value of services has been stipulated, so I don't know what this adds.

MR. WING: It's just by way of background, Your Honor.

Q (By Mr. Wing) Mr. Robinson, do you have a specialty in the way of your legal practice?

MR. BAILEY: That is all going to what the Court stipulated to.

THE COURT: Make it quick. You are not adding — when lawyers stipulate to things and when they have a case that deals with documents, just inevitably they have to say something because they kind of feel the case is naked unless somebody says something. And I think that is just what you are doing because I don't see any point in all of this. We stipulated to the reasonable value of the attorneys' fees. I would find now, and it couldn't be disputed, that it was necessary if you were going to continue in this business to somehow do something about the picketing. Now that is the background. So I don't know what more you can establish, I don't know.

MR. WING: Thank you, Your Honor.

Q (By Mr. Wing) There has been testimony today with respect to the involvement of the legal firm of Poore, Roth, Robischon & Robinson in various disputes that have taken place with respect to the Carpenters Union in Summit Valley Industries. You are the at-

torney who was primarily responsible for handling that particular litigation?

A Yes, I am.

Q Could you please describe the circumstances surrounding the initial representation?

A Gene Spolar called me on October 11, 1972 and advised me that there was pickets at the plant. Additionally, he advised that it had come to his attention that the Carpenters Union was requring their members not to work on modular homes that had been delivered to the site, the customer's site; was refusing to allow union contractors and their employees to make the homes habitable.

He further advised that the Carpenters Union had filed charges against him and was threatening to fine him for being the plant manager of Summit Valley.

Q Did you form an opinion as to the legal remedy that should be pursued on behalf of Summit Valley Industries?

MR. BAILEY: May I have a continuing objection to this line of questioning?

THE COURT: You may.

A I did.

Q (By Mr. Wing) And what was that opinion?

A My opinion was that the conduct complained of was in violation of Section 8(b)(4)(B) and (D) Secondary Boycott Act.

You first file a charge with the National Labor Relations Board and then seek injunction under Section 10L of the Act and then obtain a cease and desist order through the administrative process.

Q There has been testimony with respect to a 10K proceeding. Could you describe the involvement of a private attorney in a 10K proceeding, as opposed to an NLRB attorney?

A The 10K proceeding is undertaken entirely by the counsel for the private party. The general counsel of the NLRB does not represent either party in that proceeding.

Q During the course of these proceedings, did you have occasion to become involved with further appeals to the National Labor Relations Board, to the Ninth Circuit, application of certificate to the Supreme Court?

A Yes.

Q And have there been, were there further proceedings in the Ninth Circuit involving enforcement of the National Labor Relations Board Order?

A Yes, there was. The National Labor Relations Board filed a contempt proceeding in the spring of this year and, after the union undertook certain things to comply with the Board's Order, the Ninth Circuit in June of this year, discontinued its contempt proceedings.

Q Would you describe the scope and complexity of the legal issues involved briefly?

MR. BAILEY: May I make a special objection? We seem to be doing something that we have stipulated to and the purpose of making that stipulation was to ad-

vise of what he's talking about. We agreed to that. The basis of this case was decided by this Court when they ruled that the decision of the Ninth Circuit was Res judicata, estoppel that's already been litigated and I don't know what is going —

THE COURT: Well, this is my view of it, Mr. Bailey, I just don't see that you are doing anything.

MR. WING: Okay.

MR. BAILEY: I thought that we wanted to save time by stipulating. That's what I had in mind when I stipulated.

MR. WING: I will try to shorten it up, Your Honor. Could I have a brief moment with my witness, Your Honor?

At this time, Your Honor, I would set forth with Plaintiff's Exhibit 7 and 8, which have already been admitted in Court, which details in summary fashion the attorneys' fees and expenses involved during the course of pursuing this litigation.

Q (By Mr. Wing) Mr. Robinson, during the course of your representation of Summit Valley Industries in this litigation, did you have continuing objections from the carpenters union with respect to what you were trying to do?

A Yes, we did. After the National Labor Relations Board issued its decision, the Regional Director, as required by the procedures of the Act, contacted the Carpenters Union and advised the Carpenters Union to state whether or not it would comply with the terms of

the award issued by the National Labor Relations Board. This is a standard inquiry that is made in all 10K cases after the Board issues its decision. The Carpenters Union in what I believe to be very, a very novel situation and novel move, advised the Regional Director that, not withstanding the Board's decision, it would continue to picket Summit Valley if necessary in order to claim this work that was there.

Q Then was your continued representation of Summit Valley Industries necessary during the entire period of time?

A In my opinion, the Carpenters Union at all times evidenced an intent to resume picketing and engage in all of the activities regarding the enforcement of its so-called work preservation clause in its contract to entirely prohibit the introduction of modular homes in Butte, Montana, and the Union would have done so, in my opinion, at any time up to and including the Ninth Circuit Court of Appeals' decision had it had the opportunity legally to do so.

Q And when did this Ninth Circuit Court of Appeals' decision come down?

A I believe March 9, 1978.

MR. WING: I have no further questions.

MR. BAILEY: I have no questions of this witness.

(Witness excused.)

MR. ROBINSON: We rest our case with regard to the damages sustained by Summit Valley Industries in pursuing the National Labor Relations Board litigation.

THE COURT: Mr. Bailey.

MR. BAILEY: If the Court please, we request that you take judicial notice of the subsequent enforcement proceedings filed by the National Labor Relations Board in the Ninth Circuit Court and withdrawal of those by the National Labor Relations Board and I will speak about the case numbers and so forth. That is related to the last statement made by counsel on the stand. The fact is that that Board did file an enforcement. There was acknowledgment to comply and the Board withdrew it based upon a settlement of that enforcement act.

Also request that you take judicial notice of the Board and the Ninth Circuit decision in the National Labor Relations case filed herein, and I think that you are well aware of that because it was a part of the motion for summary judgment earlier made on the merits and was used by the Court in that fashion.

Then finally, will make a motion to dismiss the remaining issues of the Plaintiff's basis of its claim for example, for the attorneys' fees and also for any costs that may apply to Mr. Spolar's absence or time spent in respect to the National Labor Relations Board proceedings.

THE COURT: Is there any question as to the judicial notice of the National Labor Relations Board proceedings from beginning to the end of them?

MR. ROBINSON: I think that in my pre-trial brief I have given a summary of all of the proceedings. I have given the citations found in the Labor Relations reference manuals to all of the decisions which were

reported in this matter and I have cited everything, proceedings —

MR. BAILEY: Except the last one, Enforcement Act proceedings.

MR. ROBINSON: I cited the numbers of the Circuit Court. It's not reported in the Federal Reporter.

THE COURT: My question is, is there any, does anybody have any problem about the Court taking judicial notice of the whole NLRB proceedings?

MR. ROBINSON: Absolutely not.

MR. BAILEY: No.

THE COURT: I will do that then. The judgment on the motion to dismiss is reserved.

What do you want to do by way of briefs? Is there anything further?

As I see it, the matter pretty largely depends on the view the Court took on the immediate case and that about ends it, whether briefs would be helpful, I don't know.

MR. ROBINSON: Mr. Bailey just served me this morning with a brief on the issue and I haven't had time to look at it. I would like to review it and have the opportunity, if I could, to submit a reply brief.

MR. BAILEY: I have no objection to that, Your Honor.

THE COURT: Very well.

MR. BAILEY: If he raises new matter, I suppose he

would raise new matter, in order to respond to it, do I have the opportunity to respond?

THE COURT: Well, why don't you take five days within which to submit a reply to Mr. Bailey's brief and you have five days to respond if you feel it's necessary.

MR. BAILEY: Thank you.

THE COURT: And, again, at that time the matter will be deemed submitted.

So we will be in recess.

(End of proceedings.)

CERTIFICATE

STATE OF MONTANA)
: ss.
County of Missoula)

I, Carroll B. Copeland, C.S.R., R.P.R., Official-Freelance Court Reporter and Notary Public, State of Montana, residing in Missoula, Montana, do hereby certify:

That I was duly authorized to and did report the testimony and evidence in the above-entitled cause.

I further hereby certify that the foregoing pages of this transcript represents a true and accurate transcription of my stenographic notes.

IN WITNESS WHEREOF, I have hereunto set my hand this the 15th day of October, 1979.

Carroll B. Copeland, C.S.R., R.P.R.,
Official-Freelance Court Reporter.

APPENDIX J

PLAINTIFFS' EXHIBIT 1

SUMMARY OF DAMAGES

EUGENE SPOLAR, LOST TIME

Re: *Summit Valley Industries, vs. Carpenters' Union, Local 112*

EUGENE SPOLAR, LOST TIME:

A.	7 (of 12) full days of administrative hearings at 8 hours per day	56 hours
B.	3 half-days of administrative hearings at 4 hours per day	12 hours
C.	1 day, injunction hearing, Helena, Montana	8 hours
D.	Estimated 30 hours of pre-trial preparation with attorneys in NLRB proceedings	30 hours
E.	Estimated 16 hours of preparation and attendance at 10(k) hearing	16 hours
F.	Estimated miscellaneous time: telephone conferences with attorneys, reading reports from attorneys, review of decisions rendered, etc.	25 hours
	Total Hours	147 hours
	147 hours at rate of $25.00	$ 3,675.00

DCR:cw
BIL6/BB

PLAINTIFFS EXHIBIT 7

SUMMARY OF DAMAGES

ATTORNEYS' FEES AND EXPENSES

Re: *Summit Valley Industries vs. Carpenters' Union, Local 112*

I. ATTORNEYS' FEES AND COSTS:

A. Bill dated 12/27/73:			
Legal Fees	$9,576.65		
Costs		$93.05	
Total			$ 9,669.70
B. Bill dated 9 26/74:			
Legal Fees	1,608.00		
Costs		296.25	
Total			1,904.25
C. Bill dated 2/26/73:			
Legal Fees	—		
Costs		116.53	
Total			116.53
D. Bill dated 2/15/79:			
Legal Fees	—		
Costs		497.17	
Total			497.17
E. Bill dated 7/10/79:			
Legal Fees	1,400.00		
Costs		16.68	
Total			1,416.68
	$12,584.65	$1,019.68	$13.604.33

BREAKDOWN OF ATTORNEYS' FEES AND EXPENSES, BY PROCEEDING

1. Beginning of Picketing through U.S. District Court Injunction (10/11/72 to 11/08/72):		
Legal Fees (33.7 hrs. @ $35.00)	$1,179.50	
Cost and Expenses (tel. calls, etc.)	$ 51.75	
Total		$1,231.25
2. From Injunction through 10(k) Proceedings (11/09/72 to 12/13/72, and 4/11/73):		
Legal Fees (38.0 hrs. @ $35.00)	$1,330.00	
Cost and Expenses (tel. calls, etc.)	$ 55.58	
Total		$1,385.58
3. Unfair Labor Practice Proceedings		
(a) Before Administration Law Judge (12/14/72 to 5/15/74):		
Legal Fees (13½ days @ $400.00)	$5,400.00	
(71.0 hrs. @ $35.00)	$2,485.00	
Total	$7,885.00	
Cost and Expenses	$ 440.12	
Total		$8,325.12
(b) Before the NLRB (5/16/74 to 5/12/75):		
Legal Fees (7.3 hrs. @ $40.00)	$ 292.00	
Cost and Expenses	$ 56.70	
Total		$ 348.70
4. Ninth Circuit Court of Appeals (5/13/75 to 3/08/78):		
Legal Fees (12.0 hrs. @ $50.00)	$ 600.00	
Cost and Expenses	$ 12.37	
Total		$ 612.37

5. Post-Ninth Circuit Proceedings (3/09/78 to 6/19/79):		
Legal Fees (13.5 hrs. @ $50.00)	$ 675.00	
Cost and Expenses	$ 16.68	
Total		$ 691.68

DCR:cw
BIL6/BB

APPENDIX K

CARPENTERS, LOCAL 112 83 LRRM 1013

CARPENTERS, LOCAL 112—
(Summit Valley Industries)

Decision of NLRB

UNITED BROTHERHOOD OF CARPENTERS & JOINERS OF AMERICA, LOCAL 112, AFL-CIO, Butte, Mont. and SUMMIT VALLEY INDUSTRIES, INC. and BUTTE TEAMSTERS UNION, LOCAL NO. 2, a/w INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFERS, WAREHOUSEMEN AND HELPERS OF AMERICA, Case No. 19-CD-212, April 6, 1973, 202 NLRB No. 153

Before Fanning, Kennedy, and Penello, Members.

* * *

(headnotes omitted)

[*Text*] The work in dispute consists of the manufacture or building of pre-built or modular homes and other structures, including work at the intended sites of said structures necessary to make the structures habitable, to the extent all such work is claimed by Carpenters pursuant to its collective-bargaining agreement with the

Silver Bow Employers' Association and Butte Contractors' Association, herein called Silver Bow and BCA, respectively. * * *

The Employer manufactures modular homes at its plant and sells the finished product to realtors or ultimate users who in turn contract independently with other firms for the laying of the foundations on which the modular homes will be installed at the jobsite. The user can also arrange to have a garage built and attached to his house. One of the firms that specialize in foundation laying and garage building is Jovick Construction, Inc., herein called Jovick. Jovick has been so utilized by some of the Employer's customers. Jovick is affiliated with BCA which in turn has entered into a collective-bargaining agreement with Carpenters, article XXII of which provides *inter alia* that, for any given work project, a certain designated minimum amount of work has to be done at the jobsite by workmen represented by Carpenters if not done at the company-signatory's shop. At the time of the hearing the Employer's complement of employees was approximately four, although the number has been as high as 20.

In mid-September 1972, the Employer and Teamsters entered into a collective bargaining agreement, effective June 12, 1972, which provided that employees represented by Teamsters would perform all in-plant manufacture and assembly work and all related on-site preparation.

On or about October 3, 1972, Leo Calcaterra, an employee of Jovick and a member of Carpenters, was putting the shingles on the roof of a garage attached to a

modular home built by the Employer and already delivered on site. Upon hearing of this, James Cadigan, business representative of Carpenters, came on the scene and ordered Calcaterra off the job, advising him that the house he was working on was "unfair." Calcaterra complied with the request and notified Frank Jovick, co-owner of Jovick Construction, Inc.,[3] as to what happened. The next day, Jovick met Cadigan and asked why his man was pulled off the job. Cadigan told him that his work of putting the garage on the Employer's prefabricated modular home violated the BCA-Carpenters contract. Pursuant to advice from his attorney, Frank Jovick completed work on the garage himself, all of Jovick's employees having abided by Cadigan's order to refuse to work on modular homes.

Faced with an inability of Jovick to complete his on-site work, the Employer's customers, on two occasions, requested that the Employer complete the work itself, which it did. After the Employer started assigning its own men, represented by Teamsters, to finish the necessary on-site work, Carpenters began picketing the Employer's plant. On October 11, the picketing began, manifested by the carrying of a picket sign by one person, the fastening of the picket sign to the fender of a car parked near the entrance to the Employer's plant, or the leaning of the sign against a nearby telephone pole. The picket sign read "NOTICE TO PUBLIC, This Employer *did not* employ members of Carpenter's Union in the work to be performed on this

[3]The corporation is owned and operated by Frank Jovick and his wife.

building—Local 112, Carpenters Union AFL-CIO,"—"this building" referring to a model prefabricated home situated on the premises near the sign. The picketing continued on October 12, 13, 18, 19, and 24 and November 7, 1972. The Employer sought, and on November 8 obtained, a temporary restraining order pursuant to Section 10(1) of the Act from the United States District Court for the District of Montana. Since, that time, Jovick's employees have returned to work preparing the homesites for the employer's houses; and picketing has ceased. * * *

Carpenters contends that there is no reasonable cause to believe that Section 8(b)(4)(D) has been violated. It does not claim the in-plant work performed by the Employer's employees. The only dispute Carpenters has is with Jovick, which, as an affiliate of BCA, was bound by article XXII of the Carpenters-BCA agreement guaranteeing employees of Jovick a certain minimum amount of work at each construction site.[5] The validity

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[5]Sec. 3A of art. XXII reads in relevant part as follows:

All of the following work shall be performed at the site of construction, alteration, or repairing of the building structure or other work and shall not be subcontracted off the job site, unless said work is done at the Employer's shop.

(1) All the erection of the forms for basements and/or footings for the structures. Nothing herein shall be construed to apply to prebuilt forms which have, through past practice, been utilized by the Employers.

(2) The installation of all exterior siding or finishing, or, in the alternative, all wallboards and/or paneling.

(3) The installation of exterior trim on the structure, or, in the alternative, all interior trim on the structure.

of this article has been upheld by the Board.[6] By merely digging the foundation for, and/or attaching garage to, the Employer's prefabricated houses, Jovick was performing less than minimum work article XXII, section 3A, called for and hence was in violation of its contract with Carpenters. Any pressure exerted against Jovick, regardless of its incidental impact on the Employer, was for the sole purpose of urging Jovick to comply with the terms of that agreement, i.e., assign Carpenters the work set forth in article XXII, section 3A, even if it meant tearing down some of the prefabricated work and doing it

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(4) The installation of all interior doors on the structure.

(5) The shingling of all roofs, whether wood, metal or composition materials.

(6) Installation of all cabinets and shelving.

(7) The cutting and installation of all wooden stairs and/or bannisters.

(8) The installation of all form work for steps and/or stoops . . .

(9) The placing and fastening of all components of the structure upon the foundation.

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[6]United Brotherhood of Carpenters and Joiners of America, Local 112, AFL-CIO and Silver Bow Employers' Association and Butte Contractors' Association, 200 NLRB No. 42, 82 LRRM 1189. In this case, it was alleged that art. XXII amounted to a "hot cargo" clause violative of Sec. 8(e) of the Act, and that the striking and other coercive activities, engaged in by Carpenters to secure such a clause in its contract with the two Contractor Associations, violated Sec. 8(b)(4)(A). The Board however found such activity to be of a lawful primary nature, and art. XXII to be a lawful work preservation provision.

again. No pressure was purposely directed at the Employer to change his work assignment.[7]

As for the picketing of the Employer, Carpenters contends it was of a purely informational nature, without any indication of threats, coercion, or interference. It took place on seemingly public land and the picket signs were truthful. Thus, such informational picketing, argues Carpenters, was protected activity.

Applicability of the Statute

Before the Board may proceed with a determination of dispute pursuant to Section 10(k) of the Act, it must be satisfied that there is reasonable cause to believe that Section 8(b)(4)(D) has been violated. Viewing the total circumstances of this case, we find that Carpenters conduct went beyond merely attempting to enforce article XXII, section 3A, against Jovick. By pulling Jovick's employees off the jobsite and threatening to picket the Employer's workmen if they followed their work to the jobsite and completed the work thereon, Carpenters for all intents and purposes was preventing the Employer from delivering its product to its customers in salable condition. Only if the Employer drastically curtailed its in-plant operations and delivered the components of each modular house to the jobsite so that Carpenters would then do the work guaranteed by article XXII, section 3A, in other words reassign its plant work from Teamsters to

[7]Cadigan specifically denied vowing to "break" the Employer or manufacturer like the Employer. Cadigan also denied telling Jovick that his employees would return to work if Employer signed art. XXII.

Carpenters, would the Carpenters remove pressure from the Employer and its subcontractor Jovick.

Corroborative of Carpenters unlawful objective is the evidence of a more direct pressure placed on the Employer by Carpenters. The record clearly shows that Carpenters picketed the Employer's plant for the express purpose of effecting a re-assignment of the prefabrication of the modular houses from workmen represented by Teamsters to workmen represented by Carpenters, either on the jobsite or in the plant. Cadigan in fact admitted that the picketing would have ceased had the in-plant work been given to members of Carpenters. Furthermore, Cadigan testified that additional picketing and handbilling would take place if Teamsters insisted on following the work to the jobsite. From these circumstances, we find there is reasonable cause to believe that a violation of Section 8(b)(4)(D) has occurred, and that the dispute is properly before the Board for determination.

Merits of the Dispute

Section 10(k) of the Act requires that the Board make an affirmative award of the disputed work after giving due consideration to various relevant factors.

1. *Certification and collective-bargaining agreements:* The collective-bargaining agreement in effect between the Employer and Teamsters clearly provides for an assignment of the work in question to employees represented by Teamsters. There is no collective-bargaining agreement in effect between the Employer and Carpenters. We thus concluded that the Employer's

contract clearly favors assignment of the work in dispute to employees represented by Teamsters.

2. *Employer and area practice:* The Employer has not been in business long enough to establish an "Employer practice." The record reveals, however, that employees represented by other Teamsters locals have performed prefabrication work at five of six modular homes manufacturing plants throughout the country. There is one other modular builder in Montana, which as a contract with another Teamsters local. There is also evidence that two modular home builders, both outside Montana, have collective-bargaining agreements with the International Brotherhood of Carpenters. The weight of evidence as to area practice favors the Employer's present assignment.

3. *Skills, efficiency, and economy of operation:* Neither union makes the claim that its members possess superior skills to perform the disputed work. In fact, as the bulk of the workers newly hired by Employer were inexperienced in modular home fabrication, and as only 1 to 3 weeks on-the-job training is deemed necessary by the Employer, it appears that the work in dispute does not call for any skills peculiar to either Carpenters or Teamsters. With respect to efficiency and economy of operations, neither union has introduced evidence tending to favor an assignment to its respective members.

In view of the foregoing, we find that the factors of skill, efficiency, and economy of operation favor neither the Employer's assignment nor an assignment of the dispute work to workmen represented by Carpenters.

Conclusions

Having considered all pertinent factors present herein, we conclude that employees who are represented by Teamsters are entitled to perform the work in dispute. This assignment is consistent with collective-bargaining agreements and area practice. In making this determination, we are awarding the work in question to employees represented by Teamsters, but not to that Union or its members. The present determination is limited to the particular controversy which gave rise to this proceeding.

Determination of dispute: Employer's employees represented by Teamsters Local 2 are entitled to the work of manufacturing or building of prebuilt or modular homes and other structures, including work necessary to make structures habitable, to extent that all such work is claimed by Carpenters Local 112 pursuant to its collective-bargaining agreement with Silver Bow Employers' Assn. and Butte Contractors' Assn. Carpenters Local 112 is not entitled by unlawful means to force or require employer to assign this work to members of Local 112 or employees represented by Local 112. Within 10 days from date of decision, Carpenters Local 112, shall notify regional director in writing whether it will abide by this determination.

APPENDIX L
EXHIBIT "A"

JD-(SF)-74-74
Butte, Montana

UNITED STATES OF AMERICA
BEFORE THE NATIONAL
LABOR RELATIONS BOARD
DIVISION OF JUDGES
BRANCH OFFICE
SAN FRANCISCO, CALIFORNIA

UNITED BROTHERHOOD OF CARPENTERS &
JOINERS OF AMERICA, LOCAL 112, AFL-CIO
AND ITS AGENT, SOUTHWEST BUILDING TRADES
COUNCIL OF MONTANA, AFL-CIO,
Respondents

Case No. 19-CC-588

and

SUMMIT VALLEY INDUSTRIES, INC.
Case No. 19-CC-591

and

JACK McLEOD & ASSOCIATES, INC.
Case No. 19-CC-604
Case No. 19-CC-604-2

and

CHAMBER OF COMMERCE OF THE
UNITED STATES OF AMERICA, FOR AND ON
BEHALF OF ITS MEMBER
BOISE CASCADE CORPORATION AND ALL OTHER
SIMILARLY SITUATED MEMBERS
Case No. 19-CE-21
Case No. 19-CD-212

James F. Kennedy, Esq., and *Leslie S. Waite, Esq.* for the General Counsel.

Poore, McKenzie and Roth, by Donald C. Robinson, Esq., of Butte, Montana, for Charging Party Summit Valley.

McCaffrey and Peterson by John L. Peterson, Esq., of Butte, Montana, for Charging Party McLeod.

Lederer, Fox and Grove, by *S. Richard Pincus, Esq.*, and *Lawrence M. Cohen, Esq.*, of Chicago, Ill., for Charging Party The Chamber.

Gerard C. Smetana, Esq., of Chicago, Ill., for Charging Party The Chamber.

Holland, Holland & Haxby, by Dave Holland, Esq., of Butte, Montana, for Respondent Carpenters.

Bailey, Doblie, Ceniceros and Bruun, by *Paul T. Bailey, Esq.*, and *Gerald C. Doblie, Esq.*, of Portland, Oregon, for Respondent Carpenters.

Benjamin W. Hilley, Esq., and *Emily Loring* of Great Falls, Montana, for Respondent Council.

DECISION

Statement of the Case

LOUIS S. PENFIELD, Administrative Law Judge: This consolidated proceeding was heard before me in Butte, Montana, on 15 hearing dates occurring between June 5, 1973 and October 26, 1973. The consolidated complaint was issued on May 11, 1973. The charges in Cases Nos. 19-CC-588 and 19-CD-212 were filed by Summit Valley Industries, Inc., herein called Summit Valley, on October 12, 1972. The charge in Case No. 19-CC-591 was filed on October 19, 1972 by Jack McLeod & Associates, Inc., herein called McLeod. The charges in Cases Nos.

19-CC-604 and 19-CE-21 were filed on January 5, 1973, and the charge in 19-CC-604-2 was filed on January 12, 1973. Each of the latter charges was filed by the Chamber of Commerce of the United States of America, herein called the Chamber. Copies of each of the charges were duly served upon the parties. The consolidated complaint alleges that Respondent United Brotherhood of Carpenters & Joiners of America, Local 112, AFL-CIO, herein called the Carpenters, engaged in various unfair labor practices in violation of Sections 8(b)(4)(i)(ii)(A) and (B), 8(b)(4)(i)(ii)(D) and 8(e) of the Act.

While the hearing was in recess, but after three days thereof had been completed, the Chamber amended its charge in Case No. 19-CC-604 to join Southwest Building Trades Council, herein called the Council, as an agent of the Carpenters with regard to certain unfair labor practices. Thereafter, on July 20, 1973 the General Counsel moved to amend the complaint to name the Council as agent for the Carpenters and a party respondent. When the hearing reconvened on July 24 the motion to amend was denied by the undersigned after hearing argument on the record. This ruling was appealed to the Board by the General Counsel and the Chamber. On July 27 the Board reversed my denial of the motion to amend and directed that I take appropriate action. Thereafter, the undersigned ordered that the complaint be amended and that the Council be given time to answer, and otherwise given the time and opportunity to review the record already made. The hearing was recessed on July 27 and resumed on September 11, at which time the Council appeared by its attorney and

remained and participated during the balance of the hearing.

All parties were given full opportunity to participate in the hearing, and after the close thereof, the General Counsel, the Charging Parties, and both of the Respondents filed briefs.

Upon the entire record in this consolidated proceeding, and upon my observation of the witnesses and their demeanor, I make the following:

Findings of Fact

I. Jurisdiction

Jurisdiction is not contested. This proceeding, involving as it does alleged violations of Section 8(b)(4), includes various employers or groups of employers involved in the dispute who may be characterized as primary or secondary employers within the meaning of the statute. Summit Valley, a Butte manufacturer of modular houses, purchases materials and supplies from sources outside the State of Montana valued in excess of $50,000. Boise Cascade, another manufacturer of modular houses, has its plant in Pocatello, Idaho, and directly ships houses manufactured there to purchasers in states other than Idaho which are valued in excess of $50,000. Silver Bow Contractors' Association and Butte Contractors' Association represent various employers engaged in the general contracting business in Butte, Montana. In the aggregate, the business operations of such contractors realize a gross income exceeding $500,000 and they purchase goods and supplies originating outside the State of Montana, valued in excess of

$50,000. Under the circumstances it is obvious that employers directly involved are engaged in businesses which affect commerce within the meaning of the Act, and that under existing Board jurisdictional standards assertion of jurisdiction is warranted, and I so find.

II. The Labor Organizations Involved

Respondent Carpenters and Respondent Council are each, and at all material times have been, labor organizations within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

The entire controversy in this lengthy and involved proceeding centers on the lawful or unlawful nature of a so-called work preservation clause found in a contract between Respondent Carpenters and certain building contractors who function in Butte, Montana, and the adjacent area. It is the contention of the General Counsel and the Charging Parties that this clause was conceived for an unlawful secondary "cease doing business" object, and that it was entered into and enforced by unlawful means. The legal responsibility of Respondent Council for aiding Respondent Carpenters in its unlawful pursuits, and the responsibility of Respondent Carpenters itself for alleged unlawful work assignment pressures represent subsidiary, but not unimportant, issues.

Respondent Carpenters contend the contract clause to be concerned solely with lawful work preservation within the rationale set forth by the United States Supreme Court in *National Woodwork Manufacturers*

Association, 386 U.S. 612, 64 LRRM 2801, herein called *National Woodwork*. The General Counsel and the Charging Parties dispute Respondent Carpenters' interpretation of *National Woodwork* on several counts, claiming, among other things, that the Carpenters' enforcement efforts are unlawful within the rationale of the Board in *Plumbers and Pipefitters Local No. 438 (George Koch Sons, Inc.)*, 201 NLRB No. 7, herein called *Koch*. Subsequent to the close of this hearing *Koch* was affirmed in *George Koch & Sons, Inc. v. N.L.R.B.*, 84 LRRM 2957 (C.A. 4, December, 1973).

The disputed clause came into being in 1971 following a strike in which it had been the primary issue. During the strike efforts to obtain such a work preservation clause were charged to be unlawful within the meaning of Section 8(b)(4)(A) and Section 8(e). After litigation these charges were dismissed by the Board in *Carpenters Local 112, (Silver Bow Employers Association)*, 200 NLRB No. 42, herein called the *Silver Bow* case. The lawful nature of the clause itself, however, is again attacked in the instant proceeding along with the lawful character of the means used to bring about its enforcement.

The advent of modular houses into the Butte area brought about the Carpenters' demand for the clause. We will first define the term "modular house" and contrast its meaning with that of the more conventional type of house. Then we will view the background against which the disputed clause came into being and consider the means used to enforce it. Finally, in addition to treating with the subsidiary issues, we will evaluate the alleged unlawful nature of the object for which the clause was pursued or enforced.

A. Modular Houses, Stickbuilt Houses, And Carpenters' Work

Respondent Carpenters represents journeymen and apprentice carpenters in the Butte area who work on the construction of dwellings in commercial or industrial buildings. Carpenters normally work for area contractors and perform their work either at a building site or in the shops of the contractors. For many years, collective-bargaining agreements between Butte contractors and Respondent Carpenters have controlled the working conditions.

The traditional so-called stickbuilt house involves the work of various crafts, each represented by a difference union. For the most part, the differing skills and the jurisdictional lines between the crafts are well defined. A stickbuilt house normally starts with the digging of a foundation; preliminary piping follows; footings and concrete walls are then put in; a frame is built; piping and basic wiring go in; outside siding and roofing are put on; and finally there will be inside finishing and the installation of cabinets. Materials used by the different crafts will be delivered to the jobsite, some in a substantially prefabricated state. Onsite work, however, by all crafts follows a more or less well-defined sequence toward completion, with steady work performance depending on the availability of workers in each craft as its work is needed. Reasonably good weather conditions are required for most jobsite work to progress. In the case of the Butte carpenters, many innovations have been accepted in the past 25 years. These include the use of power tools, precut lumber, prefabricated cabinets, and many other items. It is estimated that as a result of such

innovations two carpenters at the present time are able to do the same amount of work which formerly required the use of five carpenters.

Modular houses are best described as factory built. They are a fairly recent development in the house building industry. This proceeding directly involves two modular house manufacturers, Summit Valley Industries, Inc. and Boise Cascade Corporation. Summit Valley, the smaller of the two enterprises, is located in Butte. The far larger Boise Cascade factory is located in Pocatello, Idaho, some 250 miles from Butte, a location from which it serves a large area.

The construction process followed with a factory built house is similar at both enterprises. The houses are built pursuant to a few well-standardized plans. The construction takes place indoors and follows what is essentially an assembly line process. Because of its fixed pattern, the work called for is frequently repetitive. This enables the manufacturer to staff the plant with job trained workers rather than having to call upon the journeymen and apprentice craftsmen that jobsite construction demands. In such a plant, full use will be made of overhead cranes and readily available power equipment of a diversified nature. This makes a substantial contribution toward an efficient operation and a steady flow of work. Normally, several houses will be on the production line at the same time. This will make it possible to move employees from one area to another, and make full use of their limited job trained skills. Since all work is done indoors, inclement weather does not result in work interruptions. Accordingly, employees working for modular house manufacturers have an opportunity for

far steadier employment than comes to employees working at jobsites. The centralization of construction on all the houses also enables the manufacturers to keep substantial inventories of materials and take full advantage of lower costs which may come about through making large purchases.

Summit Valley produces only three different models of modular houses from which a buyer may choose. Each of these has a standard basic design but a variety of options are open to a buyer. Boise Cascade has some 35 different plans and a greater variety of options. A modular house will come from either factory as a finished product completely wired, completely plumbed, with all appliances installed, with the carpeting laid, and with the painting completed. It needs only to be transported to the building site, placed on a foundation, and to undergo what is called stitching together to become immediately habitable. The required stitching, however, involves a substantial amount of work. The stitching is absolutely essential for each modular house, and much of such work falls within the carpenter's craft. Larger houses are usually transported in two halves which must be joined at the jobsite by a stitching process. In every case there also will be wires and plumbing to be connected, and usually the job will include the hanging of some inside doors, and the building of stoops, stairs or railings. A modular house, of course, must always be placed upon a foundation. This will have been constructed prior to delivery. The construction of foundations for modular or stickbuilt houses does not differ.

Modular houses are generally marketed to prospective purchasers, either by the manufacturer directly or through a dealer. Generally speaking, the purchaser chooses a model from an available plan, chooses the options he desires and makes an initial deposit. After this the house will be built at the plant. Upon its completion the manufacturer will receive the agreed upon price usually obtained by financing with a lending institution. The completed house will be transported to the building site by the manufacturer. Ordinarily the purchaser makes his own arrangements with the contractor to put in an appropriate foundation and do the needed stitching. Summit Valley markets the houses which it builds directly. At times material to this proceeding, Jack McLeod & Associates was the franchised dealer for the Boise Cascade houses sold in the Butte area.

From the foregoing, it is apparent that each type of dwelling is the product of a differing process. The building of a stickbuilt house is for the most part a continuing jobsite process involving the intermeshing of a number of crafts. These crafts, following a somewhat fixed sequence, assemble and construct the finished habitable dwelling from a variety of material delivered to the jobsite in a greater or lesser prefabricated state. The overall size, the floor plan and the variety of elaborations in a stickbuilt house are limited only by the money which the owner is prepared to spend. On the contrary, a factory built modular house is a standardized product. It is strictly limited as to size and pattern, with few variations in design or floor plan available. The options relate principally to such matters as types of wiring, types of appliances to be installed, and differences in the paint or

other decor. The size of a modular house is limited by the manufacturer's design, and such houses come only in a range between 1,000 and 1,800 square feet. It is conceded that the cost per square foot of a modular house is less than the cost per square foot of a stickbuilt house of comparable size and finish. Considerable testimony was received as to the relative cost of the two types of houses, but it became apparent that so many variables were involved that any definitive determination as to the precise range of the differential is not practical. Suffice it to say that the record establishes the differential to be substantial, and the comparable quality of the two types of houses sufficiently close that given similar sized houses, the lower priced modular house would have a marked competitive advantage. The record further shows there is a shortage of houses in the price bracket within which modular houses fall. Thus it is a fair assumption that the price advantage will frequently result in a modular house being chosen by a prospective purchaser, despite its standardized pattern.

As noted above, the manufacture of a modular house, unlike the erection of a stickbuilt house, does not require the use of skilled employees. Thus the employment pattern at the manufacturer's plants ignores craft lines, and the work force is comprised of job trained production and maintenance employees. Both Summit Valley and Boise Cascade employees are organized along industrial lines. At Summit Valley, Local No. 2 International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein called the Teamsters, represents the employees in a production and maintenance unit. The Teamsters' contract wage scale is

substantially lower than that provided for the journeymen and apprentice carpenters found in the contract between Respondent Carpenters and the Butte Contractors. Absence of a weather problem, however, makes plant employment possible on a more steady basis. A Local of United Brotherhood of Carpenters and Joiners of America represents the Boise Cascade workers in Pocatello, also on an industrial basis. Although the record does not disclose the wage scale it is a fair assumption that the pattern is substantially similar to that found at Summit Valley.

It is both traditional, and necessary, that in building a stickbuilt house, carpenters will do all needed woodwork on the foundation and basements, all woodframing, all interior and exterior siding, all shingling, and the installation of all the cabinets. When a modular house is taken to a jobsite only the foundation forms, the stitching, and some work on stairs, railings and doors remain to be done at the jobsite. All the interior and exterior woodwork will have been done at the factory. This necessarily means that there will be less jobsite work for carpenters in any given situation where the house is modular rather than stickbuilt.

B. The Background, the Strike and Article XXII

Respondent Carpenters and some fifty contractors in the Butte area who employ carpenters, have had a collective bargaining relationship for many years. Insofar as this record shows, prior to 1969, no serious problems relating to onsite construction work had arisen between these contracting parties.

In 1969, John A. Bender, a Butte realtor, became the franchised dealer for Interstate Homes, Inc. Interstate manufactured modular houses in a nonunion plant located in Salt Lake City, Utah. Houses that Bender sold to customers were to be shipped by Interstate to the Butte area and placed on appropriate foundations there. The foundation and the stitching work was to be done by contractors employed by Bender or his customers. When this was noted by Respondent Carpenters, Respondent Council and other construction unions, they brought pressures against the Butte contractors to prevent their doing the needed work to make the houses habitable. This resulted in 8(b)(4)(B) charges lodged against Respondent Carpenters, Respondent Council and the Laborers' Union. The issue was litigated and a Board decision was issued on January 29, 1971 in *Southwest Building Trades Council of Montana, et al. (John A. Bender)* 188 NLRB 224, herein called the *Bender* case. The Board found the conduct of all three labor organizations to be violative of Section 8(b)(4)(ii)(B) of the Act. An examination of the decision makes it apparent that the unions viewed with alarm the entry of prebuilt houses into the Butte area. Their objections were expressed both in terms of the nonunion manufacture of such houses, and fear of loss of jobs by local craftsmen should many of these prebuilt houses reach the area. It was the latter that appears to have been the primary concern of James Cadigan, then and still the Carpenters' business agent, for he is reported to have expressed himself by stating "Our dispute is protecting the work of our people." The Board found, however, that even a work preservation object would not insulate the unions from

8(b)(4) sanctions in the existing circumstances, because they were exerting their pressures on the wrong persons, and thus were using a proscribed means of enforcing even a lawful object. At the time of *Bender*, none of the unions had a contract containing a work preservation clause of any sort. Thus the contractors had neither a contractual obligation nor the power to give any of the work on the houses to any of the Butte unions except for the foundation and stitching work. Thus it was reasoned that at this time, the real dispute of the unions was with Interstate and Bender. Therefore pressures directed against the contractors involved them in a dispute not their own, with an object of causing such contractors to cease doing business with Interstate and Bender, and such conduct was found to be violative of Section 8(b)(4)(ii)(B).

The decision in *Bender* made it clear that to the extent the unions viewed the coming of modular houses as a threat to local jobs, they would be unable to pursue lawful work preservation objects without, at the very least, negotiating a contract with a lawful work preservation clause. The contract which Respondent Carpenters had with the Butte contractors came up for renewal in the spring of 1971. Respondent Carpenters proposed a work preservation clause in the new contract for the ostensible purpose of protecting the onsite jobs of its members against the apparent erosion that they envisaged would come about should fully prebuilt houses be brought into the Butte area. The contractors resisted such work preservation proposals.[1] The associations

[1]The contract negotiations involved all 50 of the contractors engaged in carpentry work in the Butte area. Previous

argued that the inevitable effect of the work preservation proposals would be to make it impractical or impossible for modular houses to be brought in and sold in the Butte area. They further argued that the lower price range of these modular houses was sufficiently below that for stickbuilt houses that their entry into the area would not interfere with or diminish the stickbuilt market but would open up a new market, and that this would have the ultimate effect of providing added work for the Butte carpenters on the modular houses as well as generally to benefit the entire Butte labor market. Respondent Carpenters, however, was not persuaded of the validity of these claims, and remained adamant in insistence that the new contract must have a work preservation clause. Other bargaining issues were resolved, but failure to agree on a work preservation clause precipitated a strike in May of 1971 that lasted for approximately 90 days. At the end of this time, the contractors capitulated and the associations signed two identical contracts, each containing Article XXII, which reads in relevant part as follows:

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negotiations had been carried on by an association known as Silver Bow Employers Association, which had been comprised of some of the larger contractors in the area. Former practice had been for smaller contractors to become individual parties signatory to negotiated agreements. In the 1971 negotiations, however, a new association, known as Butte Contractors Association, which included the smaller carpentry contractors, was formed. The two associations carried on the 1971 negotiations jointly. When agreement was finally reached, identical contracts were signed by both associations.

Contracting or Sub-Contracting or Work to be Done at the Site of Construction

SECTION 1. Application. The Employers are in the construction industry and both parties have elected to come under the proviso applicable to the construction industry contained in Title 29, Section 158(e) of the United States Code as amended.

SECTION 2. Scope of the Foregoing. Sections 1 and 3 of this Article relates to contracting or sub-contracting and work to be done at the site of the construction, alteration or repair of a building structure or other work.

SECTION 3. (A) All of the following work shall be performed at the site of construction, alteration, or repairing of the building structure or other work and shall not be sub-contracted off the job site, unless said work is done at the Employer's shop.

(1) All the erection of the forms for basements and/or footings for the structures. Nothing herein shall be construed to apply to prebuilt forms which have, through past practice, been utilized by the Employers.

(2) The installation of all exterior siding or finishing, or, in the alternative, all wallboards and/or paneling.

(3) The installation of all exterior trim on the structure, or in the alternative, all interior trim on the structure.

(4) The installation of all interior doors on the structure.

(5) The shingling of all roofs, whether wood, metal, or composition material.

(6) Installation of all cabinets and shelving.

(7) The cutting and installation of all wooden stairs and/or bannisters.

(8) The installation of all form work for steps and/or stoops. . . .

(9) The placing and fastening of all components of the structure upon the foundation.

(B) Nothing herein shall apply to any structures in the following situations:

(1) (Omitted)

(2) When the construction work done by the Employer at the site of a pre-assembled or pre-built single family dwelling unit consists of building independent structures such as garages or other structures that are not part of the unit itself.

(C) No Employer shall be discriminated against, nor be adversely affected by the Union, for accepting and completing any sub-contracted work that conforms to Paragraph A of this Article.

(D) Nothing herein shall be construed to restrict work by carpenters or contractors when pre-fabricated or pre-built components of construction not listed in Paragraph A are utilized, installed or assembled at the site of construction.

Business Agent James Cadigan testified at length concerning Article XXII. Cadigan stated that at all times he and the membership of his union feared that bringing modular homes into the Butte area would cause union members to lose work that had been traditionally performed by the carpenters because such work had al-

ready been done at the factories. Cadigan insisted that his concern was not with having his members do the factory work, nor with whether or not such factory work had been performed under union or nonunion conditions, but that the membership feared erosion of work opportunities should modular houses arrive at the jobsite with so much of the carpenters' traditional, and formerly necessary, jobsite work already completed. Cadigan testified that he viewed the prospects for expanding employment for carpenters in Butte to present no cause for optimism. Cadigan noted that in the past 80 years membership in Respondent Carpenters had dropped from nearly 1,000 to below 400. Cadigan stated that the economic health of Butte had long depended on the functioning of the Anaconda Copper Co. In the past ten years the Carpenters' membership had fluctuated between 300 and 400 with a top figure being reached only during those times when some special Anaconda project was under way. Cadigan noted that residential construction had been reasonably active for a period recently because of certain Anaconda expansion plans, but that in the future, he saw nothing, either in the Anaconda situation or elsewhere to support an optimistic view as to substantial residential construction. It was such considerations that made the membership deem it appropriate to take whatever steps were available to retain for themselves all the traditional jobsite work possible. Cadigan noted that in the negotiations, Carpenters had been willing to agree to accept prefabrication in substantial measure, and that Article XXII permits substantially completed factory built houses to be brought in. He stated the sole purpose of Article XXII was to insure retention of a certain minimum number of jobs.

Article XXII represents a compromise. It permits carpenters to work on prefabricated houses delivered to a jobsite with either the "exterior siding or finishing" left off, or in the alternative, "all wallboards and/or paneling" left off. In addition, it requires the house to be delivered with either "all exterior trim" left off, or in the alternative, "all interior trim" left off. Also Article XXII provides that the installation of all interior doors, the shingling of all roofs, the installation of all cabinets and shelving, the cutting and installation of all wooden stairs and bannisters, the installation of all form work for steps and stoops and "the placing and fastening of all components of the structure upon the foundation" must be performed by jobsite carpenters. Cadigan acknowledges this to mean that the structure would arrive at the jobsite as somewhat of a shell. However, he interprets Article XXII to mean that every bit of the work enumerated must be given to, and performed by, the jobsite carpenters or there will be a violation of Article XXII. Article XXII also provides that jobsite carpenters must perform foundation work and install stairs and bannisters. These are items which in a usual situation a contractor would be asked to perform on a modular house delivered to a jobsite. Cadigan interprets Article XXII to mean that unless jobsite carpenters are given all the other work set forth in Article XXII, it will be a violation for a contractor to perform any work whatsoever even though such traditional carpenters' work is absolutely essential to make the modular house habitable. Summit Valley and Boise Cascade houses as currently manufactured arrive at jobsites with most of the Article XXII work completed. Cadigan states that

this means that any work a contractor does on foundations, stitching or otherwise on such a house would be violative of Article XXII and any member doing such work would be subject to fines or other union discipline.

The record establishes that while it may not be impossible to manufacture or deliver structures in the unfinished state required by Article XXII, both Summit Valley and Boise Cascade deem such a mode of operation to be impractical. In substance, each would regard a structure only completed so as to conform to Article XXII as a different product from the fully finished modular house each now delivers. Each believes that to undertake the fabrication of such a product would defeat many of the economic advantages of their current production line manufacturing process. They also see dangers of damage in transit both from the lack of rigidity of such a structure and from its unenclosed state in inclement weather. Each would also foresee problems in getting insurance and adequate financing for an unfinished house. In addition each views such an unfinished house as far less marketable, and in all likelihood ultimately more costly. A production change to produce such unfinished houses would be a major one which each would regard as highly undesirable even though theoretically possible.

In view of the foregoing, I am satisfied, and find that enforcement of Article XXII as interpreted by Cadigan would make it impossible for any Butte contractor to do any of the work necessary to make the Summit Valley and Boise Cascade modular houses habitable. Thus enforcement of the clause would force or require such contractors to cease doing business with these two manu-

facturers unless and until they changed their mode of operation so as to deliver their houses to jobsites in the unfinished state required by Article XXII.

Agreement on Article XXII was reached by the Charging Parties in August 1971. The employer associations brought 8(b)(4)(i)(ii)(A) and 8(e) charges against Respondent Carpenters charging Article XXII and the efforts made to obtain it to be unlawful within the meaning of Section 8(e). The issues raised by these charges were litigated and the Board issued a decision on November 9, 1972, in the *Silver Bow* case, *supra*. The Board dismissed the complaint in its entirety, finding that the work tasks set forth in Article XXII, "constituted work currently, traditionally and historically performed by Respondent's members, and that Respondent's objective in seeking such contractual provisions and striking to obtain them was solely to preserve the work traditionally performed by its members, and that their effect upon the use by contractor members of modular homes, whether unionbuilt or otherwise, was purely incidental." The Board's conclusion rests primarily upon its evaluation of the Supreme Court decision in *National Woodwork, supra*. In *National Woodwork*, the Supreme Court, under circumstances to be more fully discussed below, found a union's efforts to obtain and enforce a clause designed to preserve traditional work of a contracting union to be a lawful primary endeavor. In *Silver Bow*, the Board noted, however, that the Supreme Court had not passed upon a work preservation issue where the contracting employer had no control over the nature of the product brought to the jobsite. The Board also noted that in *Silver Bow* the

litigation was limited to a consideration of the language of Article XXII on its face, for at the time of the hearing no attempt had been made to enforce the provisions of the clause. Thus the legality of any enforcement attempt was not before the Board at that time. What, if any, effect subsequent efforts in that direction would have on the lawful nature of the clause itself is an issue in the instant case and will be considered below.

C. The Events Immediately Preceding and the Incidents Resulting in the Charges in the Instant Cases

While the so-called *Silver Bow* case was still pending, Respondent Carpenters took no steps to enforce Article XXII. However, after the Administrative Law Judge issued his decision in May of 1972, Respondent Carpenters, believing the legality of the clause to have been resolved in its favor, undertook to implement its enforcement. Thus it is between May of 1972 and November of the same year when an injunction issued that the particular circumstances and incidents relating to the enforcement of Article XXII took place.

In January 1972, Jack McLeod and Associates, a Butte real estate firm, became the franchised dealers for marketing Boise Cascade houses in the Butte area. McLeod's customers were offered a choice of a suitable plan from among those available from Boise Cascade; McLeod would then forward the customer's order to Pocatello for manufacture; McLeod would then assist the customer in obtaining local financing; and McLeod would assist and direct the customer in making needed

arrangements with local contractors for putting in a suitable foundation and performing the needed stitching work. It was the responsibility of Boise Cascade to transport the house from Pocatello to the Butte area. This would be done by a house-moving contractor chosen by Boise Cascade. At times material to us, Boise Cascade used the services of Reed Lemmons, who both transported the house and placed it on a waiting foundation.[2] At times, McLeod would purchase a Boise Cascade house himself to sell on speculation. In such cases, McLeod would make his own arrangements with local contractors. In other cases, it would normally be the customer who assumed this responsibility with McLeod acting only in an advisory capacity.

Summit Valley is a local Butte enterprise. It did not come into being until June of 1972. Summit Valley is owned by a number of Butte residents including Gene Spolar who, in addition to being part owner, also serves as plant manager. Prior to undertaking the management of Summit Valley, Spolar had been a building contractor in the Butte area, owning and operating a business known as Spolar Construction, Inc. Spolar Construction, Inc., was party signatory to the collective-bargaining agreement with Respondent Carpenters which includes Article XXII. Although Spolar Construction, Inc., may still exist as an entity, it does not appear to have functioned actively as a building contractor after Summit Valley began its operations in June with Gene Spolar in charge. In hiring employees for Summit

[2]In the record the name of this contractor is variously referred to as "Red Lemon," "Reed Lemons," and "Reed Lemmon." All references are to the same house mover.

Valley, Spolar made no effort to hire employees skilled in any building construction crafts. Instead, from the outset, Spolar hired unskilled workers and undertook to give them job training in the manufacturing process. Respondent Carpenters initially believed Spolar Construction to be operating the plant in violation of its contract and its bargaining obligation and it filed charges relating to such conduct. These charges were subsequently withdrawn by Respondent Carpenters when it learned that Summit Valley was an entirely separate entity. Shortly after the plant opened, Butte Teamsters Union, Local No. 2, herein called the Teamsters, undertook to organize the Summit Valley plant employees. Neither at that time, nor at any time later, has Respondent Carpenters made any claim to represent the plant employees at Summit Valley. Summit Valley accorded the Teamsters recognition as the statutory representative of its employees, and in September 1972 executed a contract with the Teamsters covering the working conditions of such employees. The bargaining unit is described as "all production workers, fabricators, erectors, assemblyline workers, maintenance workers, cleanup workers, watchmen, and drivers employed by the employer at its Butte, Montana, operation."

Aside from the alleged unlawful nature of Article XXII itself, the other conduct claimed to be unlawful falls into two general categories: (1) pressures directed against the Butte contractors bound by Article XXII or against the employees of such contractors; and (2) pressures directed against Summit Valley or Boise Cascade either directly or through their agents of employees, in-

cluding a work assignment issue which involves Summit Valley alone.

1. Incidents involving the contractors

Pressures were directed against various of the contractors bound by Article XXII with respect to work to be done at Butte jobsites on modular houses manufactured by both Summit Valley and Boise Cascade.

The Jovick Incident - Jovick Construction, Inc., is a local Butte contractor. Jovick had been engaged to install a house foundation and attached garage at a Butte jobsite. At the time he undertook the job, Jovick had no knowledge that the owner was planning to place a Summit Valley house on the foundation. *On October 3, 1972,* Cadigan directed Leo Calcaterra, a union member that Cadigan observed shingling a roof on an attached garage, to stop work. Cadigan told Calcaterra that "these modular homes are unfair to our contract," and that "we weren't supposed to work on them." Calcaterra immediately left the job and reported to Jovick. *Subsequently,* Jovick met with Cadigan who told him in substance that he could not put in foundations for, or do any work whatsoever on, Summit Valley houses unless and until they came to a jobsite in the unfinished condition required by Article XXII. Cadigan concedes that he told Jovick that any work on a Summit Valley house would be a violation of Article XXII. When Jovick continued to work on the job after learning this from Cadigan, charges were brought against him as a member of Respondent Carpenters for violating his union obligations. The union trial committee found Jovick guilty of

violating his obligation to "abide by the rule of the majority, which says that he will do the work under Article XXII." The trial committee recommended that Jovick receive the maximum penalty.[3]

The Perusich Incident - Bill Perusich, another Butte contractor, had been engaged to install a foundation for what he later learned was a Boise Cascade house. On or about August 24, 1972, when two of his employees were working on such job, Cadigan appeared at the jobsite and told the employees that they "couldn't work on this particular job." Responding to their questions Cadigan advised them "that McLeod was unfair" and had "brought scab labor and set the houses up on the foundation." Cadigan also advised the employees that union members "were either going to get 50 percent of the work on the houses, or [they] weren't going to do any of it," and that if they continued working on the job they might be fined. Perusich later saw Cadigan about the problem and obtained permission from him to finish up his work on that one house. Cadigan, however, made it clear to Perusich that unless McLeod or Boise Cascade fully complied with Article XXII and brought houses to the jobsites in the condition required by Article XXII, there was to be no more work on such houses. Cadigan admits that

[3]At the same trial, Jovick was also found guilty of using his two sons to help in erecting concrete forms. The General Counsel suggests that Cadigan, in ordering Jovick to cease using such forms, was harassing him because the forms belonged to Gene Spolar and that this was just another facet of the unlawful pressure. I am not satisfied from this record that the charges relating to Jovick's sons necessarily have a direct relationship to the issues with which we are concerned in this proceeding and accordingly make no finding relating thereto.

he ordered the employees off the job, and that he discussed the requirements of Article XXII with Perusich.

The Lutey Incident - Lutey Construction, another Butte contractor, had an employee working on foundation forms for a Boise Cascade house. On October 13, 1972, Cadigan ordered the employee off the job, telling him that union members were not to work on modular houses, and that if he continued to work on the job, "he could be in serious trouble." The employee left the job. Lutey subsequently communicated with Cadigan who explained that under Article XXII he should not work on any modular houses whether the work related to foundations or any other thing. Cadigan did, however, give Lutey permission to strip the forms that had already been put in. Lutey sent his son to the job for this purpose a few days later. The son came to the jobsite at a time that Lemmons was in the process of placing a Boise Cascade house on the foundation. According to the son, Cadigan arrived at the job and told him "that he had better pick up his tools and get off the job, that this was a nonunion job." Cadigan's version of the incident does not differ substantially. He admits that he ordered the employees from the job because any work on a Boise Cascade house would be done in violation of Article XXII. He states, however, that the fact that Lemmons Moving Co. was nonunion was an irrelevant consideration because, even had the contractor himself been placing the house on the foundation, this too would have been a violation of Article XXII, and the employees would have been directed to leave the job, and they and the contractors, had they declined to follow such directions, might have been subjected to union fines.

In none of the foregoing incidents did any contractor have power to control the state of completion in which the modular house was to come to the jobsite. As we have seen with the exception of the foundation and some of the needed stitching work, the modular houses being sold by Summit Valley and Boise Cascade arrived at the jobsite with all other Article XXII work, both inside and out, completed. Thus, although the construction of a foundation and the required stitching were essential to make the houses habitable, the contractor was powerless to perform any of the other Article XXII work because it already had been done. [It was the purchaser, not the contractor,] who was responsible for the type of house to be delivered. The manufacturers, Summit Valley or Boise Cascade, alone directly controlled the finished or unfinished state of the houses they were marketing.

2. The pressures against Summit Valley, Boise Cascade, their agents or employees

With respect to Boise Cascade there were several incidents involving pressures directed against its agents or employees which are claimed to constitute unlawful inducement or coercion within the meaning of Section 8(b)(4). With respect to Summit Valley, the alleged unlawful pressures concern a pattern of events allegedly aimed at both enforcing Article XXII and compelling the work assignment.

The Lemmons Incident - Reed Lemmons is a housemover under contract with Boise Cascade to deliver Boise Cascade houses to the Butte area. In early August, while Lemmons and his crew were placing a house on a

foundation, Cadigan visited the jobsite. According to Lemmons, Cadigan asked if Lemmons' employees were union and upon learning that they were not, told Lemmons he must leave the jobsite. According to Lemmons, he understood Cadigan to represent that setting a house on a foundation was carpenters' work, and that Respondent had an agreement with Boise Cascade that houses were not to come to the jobsite fully built but in an unfinished state so that carpenters could finish them. Lemmons declined to leave explaining that the house belonged to McLeod and that he would leave only if McLeod told him to. At this point, Lemmons says Cadigan replied, "I'll have pickets out at 8 in the morning." Cadigan concedes he was aware that the house had been manufactured by Boise Cascade, and admits telling Lemmons that the work of unloading the house belonged to the carpenters. He also admits asking Lemmons if the crew belonged to any local of the Carpenters Union although he denies threatening Lemmons that Carpenters would picket if he refused to leave. Lemmons completed his unloading work and no picketing ever ensued.

The McLeod Incident - Following the confrontation with Lemmons, McLeod and Cadigan met several times and discussed the problems of bringing in Boise Cascade houses. Although there are some differences in the versions of each as to what transpired in these discussions there is no basic conflict. Thus, Cadigan made it clear to McLeod that the work of placing modular houses on foundations belonged to the Butte carpenters. He also made it clear that houses were not to come into the Butte area unless they were in the partially unfinished state required by Article XXII. Cadigan suggested that possibly

McLeod's dealership indicated he was going into the contracting business, and that if this were so, like all other contractors in the area he must also be bound by Article XXII. Admittedly, Cadigan presented McLeod with a copy of the contract and suggested that he sign it, indicating that unless he did so, Respondent Carpenters would take steps to see that no more Boise Cascade homes were brought into Butte. I view Cadigan's confrontations with McLeod as one facet of his efforts to press for enforcement of Article XXII. Basically, and this is not denied by Cadigan, he was representing to McLeod that no houses were to come into Butte that did not meet the requirements of Article XXII. If McLeod were to undertake the work himself as a contractor, he too was to be bound by Article XXII. If local contractors were to be hired, they would only function pursuant to Article XXII. Essentially, Cadigan was threatening McLeod either with picketing or with other consequences if he continued to bring Boise Cascade houses into the area in their present finished state. He was pressing McLeod either to stop bringing them in altogether, or else to make such changes in his arrangements with Boise Cascade that they would come in the unfinished state required by Article XXII.

The Garry and Pratt Incidents - Possibly as a result of the difficulties McLeod was having in placing the Boise Cascade houses on Butte jobsites, at some point in late September or early October, Boise Cascade assigned two of its Pocatello employees, David Garry and Doyle Pratt, to do needed stitching work on Boise Cascade houses in the Butte area. Both Garry and Pratt were members of Carpenters Local 1258 in Pocatello.

Before going to work in Butte both visited Cadigan at his office. According to Garry, when they explained their purpose in coming to Butte, Cadigan stated, "There is no work for Boise Cascade," because Boise Cascade "is not signatory to our local agreement." Following this, Garry stated, Cadigan told them that if they went to work, "We will slap a picket on the job." Upon receiving this information, the two employees advised Cadigan that both were members of a carpenters local in Pocatello and that neither had come to Butte to cause problems there. The two men left and advised McLeod that Cadigan "would not let [them] go to work." Thereafter, both returned to Pocatello. Cadigan denies that he ever indicated that Boise Cascade should sign a contract with his union, or that he ever threatened to picket the job if the men worked on it, but he concedes that he did discuss Article XXII with them at some length, and he confirms that they voluntarily agreed that they did not wish to cause problems in Butte and would return to Pocatello.

The Summit Valley Incidents - As we have seen, Summit Valley entered into a contract with Teamsters shortly after it commenced its operation in June of 1972 While this agreement was primarily applicable to the production and maintenance workers at the plant itself, it contained a provision which reads as follows:

> The employer recognizes the jurisdiction of the Union over all manufacture and assembly work, including following the product to its final destination and preparation of the site, so as to preserve and protect the integrity of the products manufactured by the bargaining unit.

The Jovick incident establishes that because of Article XXII employees of the contractors were not to do onsite work on Summit Valley houses. Accordingly, customers of Summit Valley requested that Summit Valley requested that Summit Valley undertake the needed work pursuant to the contractual provision in the Teamster contract above set forth, in order that the modular houses purchased from Summit Valley might be made habitable. It was shortly after this that Respondent placed a picket at the Summit Valley plant. The picket carried a sign reading:

> This employer does not employ members of Carpenters Union in the work to be performed on this building. Local 112, Carpenters Union, AFL-CIO.

The building referred to in the picket sign was a completed modular house manufactured by Summit Valley, which was situated in close proximity to the picket sign. This picketing brought about the charges filed by Summit Valley in 19-CD-212. This case in combination with 19-CC-588 and 591 resulted in the General Counsel obtaining a 10(1) injunction from a U.S. District Court which issued on November 8, 1972.[4]

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[4]By terms of the injunction Respondent Carpenters were enjoined from picketing or otherwise inducing employees of Jovick with an object of forcing Summit Valley to assign work to employees represented by Respondent Carpenters rather than represented by Teamsters, and also enjoined from unlawful enforcement of Article XXII by forcing the contractors to cease doing business with McLeod or Boise Cascade. Such injunction is still in effect.

Following a 10(k) hearing in 19-CD-212, the Board issued a Decision and Determination of Dispute in *United Brotherhood of Carpenters & Joiners of America*, 202 NLRB No. 153 on April 6, 1973. The findings of the Board as set forth in that decision need not be repeated here. Suffice it to say that the Board concluded that employees of Summit Valley, currently represented by Teamsters, "are entitled to the work of manufacturing or building of prebuilt or modular homes and other structures, *including work necessary to make these structures habitable,* to the extent that all such work is claimed by the United Brotherhood of Carpenters & Joiners of America, Local 112, AFL-CIO, pursuant to its collective bargaining agreement with Silver Bow Employers Association and Butte Contractors Association." (Italics supplied.) Thereafter, Respondent Carpenters advised the Regional Director that it would not require Summit Valley to assign work in violation of the Act but stated further:

> That the Union affirms that it has the right, and will under some circumstances use its rights under the National Labor Relations Act, to truthfully advise the public, whether by picketing or other publicity that the Summit Valley Industries, Inc., does not employ members of, or have a contract with, the United Brotherhood of Carpenters & Joiners of America, Local 112, AFL-CIO, if, in fact, such is the truth and such picketing or publicity is for the sole purpose of advising the public of the situation.

Inasmuch as Respondent Carpenters had made a similar informational claim during the course of the 10(k)

hearing the Regional Director did not construe the language set forth above as an unequivocal disclaimer of Carpenters' interest in obtaining the onsite work. Accordingly, the complaint in the CD case was issued. No evidence was adduced in the instant proceeding indicating that the situation thereafter has changed in any particular.

3. Summary as to the incidents

All violations of Section 8(b)(4) have a dual aspect. First, they must show conduct which amounts to unlawful inducement of employees, or restraint and coercion of employers, and thus it must be shown that such conduct was undertaken for an object proscribed by the statute. The incidents which have been set forth above are substantially undisputed. While some variance exists in the testimony of Cadigan and that of other witnesses with respect to happenings regarding individual incidents, the central thrust of Cadigan's conduct whether with respect to employees, contractors, or others, stands out clearly. Respondent Carpenters had undertaken a three-month strike to obtain a work preservation clause which it believed to be lawful. The legality of the clause had been attacked, but after litigation and an initial decision the Carpenters' position on Article XXII had been upheld. The clause was apparently lawful within the meaning of *National Woodwork*. Understandably Cadigan now deemed it appropriate to enforce it and he proceeded in a forthright and undisguised manner to do so.

Clearly Cadigan's directions to employee-members

of Respondent Carpenters to leave jobsites in the Jovick, Perusich, and Lutey incidents represent inducement of employees within the meaning of Section 8(b)(4)(i) and I so find. Cadigan's discussions of Article XXII with the employer contractors occurring in connection with the same incidents were intended to be and clearly came through as threats of reprisal should the contractors continue to work on modular houses arriving at jobsites in a condition which did not conform to the requirements of Article XXII. Such conduct by Cadigan constitutes restraint and coercion of such employers within the meaning of Section 8(b)(4)(ii), and I so find.

The foregoing incidents each involved employers bound by the provisions of Article XXII. The Lemmons, the McLeod, the Garry-Pratt, and the Summit Valley incidents each involve conduct directed against persons not in privity of contract with Respondent Carpenters. The threats or inducement by Cadigan, however, are equally well established. Despite his denial, I have no doubt that Cadigan threatened Lemmons with the possibility of picketing should Lemmons continue to place Boise Cascade houses on foundations. Cadigan was also threatening McLeod with reprisals should he continue to bring in Boise Cascade houses in their finished state. Becoming bound to, and abiding by, a contract with Article XXII was one way McLeod could meet the problem. Since McLeod was a dealer for Boise Cascade, this was at the same time a threat against Boise Cascade to change its operation to conform to Article XXII or face problems with its houses coming to the Butte area. Thus I find Cadigan's conduct toward both Lemmons and McLeod to constitute threats and coercion against each

of them and against Boise Cascade within the meaning of Section 8(b)(4)(ii). With regard to Boise Cascade employees Garry and Pratt, Cadigan urged them as union members not to work on Boise Cascade houses in the Butte area, and indicated they might have trouble with his union should they attempt to do so. This was obviously inducement of these employees not to work on Boise Cascade houses in Butte within the meaning of Section 8(b)(4)(i) and I so find. With respect to Summit Valley, the picketing was both inducement of employees of Summit Valley and restraint and coercion of Summit Valley within the meaning of Section 8(b)(4)(i) and (ii), and I so find. Whether any or all of these incidents of restraint and coercion were for a proscribed object, and then became conduct violative of Section 8(b)(4) is to be considered below.

D. The Alleged Unlawful Objects

Respondent Carpenters does not seriously contest that it engaged in the various pressures, as described above, both to attain and enforce Article XXII. It defends such conduct by asserting that it was undertaken for the lawful primary object of obtaining and enforcing a lawful work preservation clause. The General Counsel and the Charging Parties claim the enforcement efforts against both contracting and non-contracting parties to have had an unlawful object within established Board doctrine. Further, they claim that such enforcement efforts, coupled with various "surrounding circumstances," warrant a finding that "entering into" a contract containing Article XXII is unlawful within the meaning of Section 8(e) and that pressures to attain it

were violative of Section 8(b)(4)(A).[5] To resolve these issues we must first consider the work preservation concept as evolved by the Board and the Courts, and then undertake to apply it to the facts and circumstances surrounding this case.

The decision of the Supreme Court in *National Woodwork* sets the basic parameters of the work preservation concept.[6] We will consider the holding of the Supreme Court in this case and its limitations, as well as the various interpretations later made by the Board and the Courts of its full meaning.

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[5]The General Counsel and the Charging Parties correctly point out that the term "entering into" is not limited to the initial signing of an agreement but that, at least for 10(b) purposes, a contract may be viewed as reaffirmed or "reentered into" when its terms are acquiesced in or enforced by the parties. This record establishes without dispute that Respondent Carpenters pressed for enforcement of Article XXII, bringing pressures against both the contractors and their employees, and that the employers yielded to such pressures. Therefore they may be said to have "entered into" the contract at the times such pressures were asserted. Thus we are not precluded from considering the validity of Article XXII *per se* as distinguished from the manner of its enforcement. *Dan McKinney Co.*, 137 NLRB 649; *Milk Drivers and Dairy Employees Local Union No. 537 (Sealtest Foods)*, 147 NLRB 230.

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[6]*National Woodwork Manufacturers Association* v *N.L.R.B.*, 386 U.S. 612, 64 LRRM 2801.

[7]In relevant part Section 8(b)(4) and Section 8(e) read as follows:

(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal

The basic issue before the Court in *National Woodwork* involved a so-called product boycott situation, a common occurrence in the construction industry. A product boycott may occur when an employer brings a prefabricated product (i.e., doors, cabinets, an entire house, etc.,) to his jobsite, his employees are asked to install or otherwise work on such product and a union brings pressure of one sort or another, designed to prevent the employees from handling or otherwise working on the product. When the employer yields to pressure of this nature, he must, in effect, "cease doing business"

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in the course of his employment to use, manufacture, process, transport or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is:

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by section 8(e);

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9: Provided, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

* * *

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a

with the producer of the product, and either obtain the product elsewhere or have his own employees produce it for him.[7] No purpose will be served by an historical analysis of Section 8(b)(4) and Section 8(e). Suffice it to say that the protections of employers against union pressures to cease doing business with other persons were in a measure aimed at product boycott situations. It is with the limitation on the degree of this statutory protection that *National Woodwork* concerns itself. Its basic holding is that the scope of the protection is not unlimited, and that not every situation where there is a cease doing business object and effect will render the pressures unlawful.

In *National Woodwork,* we find a subcontractor (Frouge) working at a construction jobsite. Frouge had a contract with a union whereby he had agreed that union members would not be required to handle prefabricated doors. Nevertheless, Frouge purchased and brought pre-

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particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work;

* * *

(e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void: . . . .

fabricated doors to the jobsite to be installed. The union ordered its members not to handle them. Fabrication of doors by union members was admittedly their traditional work, and Frouge's contract with the general contractor did not preclude his bringing so-called "blank doors" to the jobsite for his employees to fabricate. The Court undertook an elaborate review of the legislative history, but the justices split five to four on its meaning. All the justices agreed that if the clause be deemed lawful and enforced it would have the necessary consequence of forcing Frouge to cease doing business with the fabricators of doors. The statute appeared to proscribe any object of this nature in explicit terms. This sufficed for the dissenting justices to find the clause unlawful. The majority, however, viewed the legislative history as requiring a less literal interpretation. The basic purpose of Section 8(b)(4) and Section 8(e) was viewed as protecting neutrals against involvement in a dispute not their own, but the majority felt this should not be construed to mean that a union must forego its right to bring pressures against the primary employer directly involved in the dispute. The fabrication clause in Frouge's contract was viewed as having as a basic purpose preservation of traditional work which had been done by Frouge's employees at the jobsite. Sections 8(b)(4) and 8(e) were not to be viewed as protecting an employer against pressures where the pressures were aimed at protecting traditional work of this nature, even though exercise of such pressures had the collateral secondary effect of causing the employer to cease doing business with another person. Such effect was to be viewed as an incidental consequence, and not as a

limitation on pursuit of the primary right to preserve traditional work. The clause was therefore held to be a lawful work preservation clause, and union pressures to enforce it likewise lawful.

The *National Woodwork* holding, however, was limited in scope. As noted above, Frouge was not required by any contractual arrangement with his general contractor to use prefabricated doors. He had the power to give the jobsite fabrication to his own employees, and that is all they sought. The Court stated specifically that it was not passing on a situation where a contractor did not have "control" over the work a union sought to preserve for its members. The Court also noted that determination of a work preservation object was not something casually made, but rather, something demanding careful inquiry. In this connection, the Court said:

> The determination whether the "will not handle" sentence of Rule 17 and its enforcement violated Section 8(e) and Section(b)(4) cannot be made without an inquiry into whether under all the surrounding circumstances, *the Union's objective was preservation of work for Frouge's employees, or whether the agreements and boycott were tactically calculated to satisfy union objectives elsewhere.* Were the latter the case, Frouge, the boycotting employer, would be a neutral bystander, and the agreement or boycott would, within the intent of Congress, become secondary. There need not be an actual dispute with the boycotted employer, here the door manufacturer, for the activity to fall within this

> category, so long as the tactical object of the agreement and its maintenance is that employer or benefits to other than the boycotting employees or other employees of the primary employer, thus making the agreement or boycott secondary in its aim. *The touchstone is whether the agreement or its maintenance is addressed to the labor relations of the contracting employer vis-a-vis his own employees.* This will not always be a simple test to apply. But "however difficult the task of drawing lines more nice than obvious, the statute compels the task." (Underscoring supplied)

In a footnote, the Court in referring to the "surrounding circumstances" indicates that such "might include the remoteness of the threat of displacement by the banned product or services, the history of labor relations between the union and the employers who would be boycotted, and the economic personality of the industry."

Unoke Frouge, the Butte contractors could not control the type of house that would be put on a jobsite. The purchaser engaged a contractor to build a foundation or do certain work on a structure he bought to the jobsite. If it were a modular house, the purchaser had selected it from the group available from the manufacturer, and the latter had determined the state of completion in which the house was sent to the jobsite. As we have seen, the Summit Valley and Boise Cascade houses were delivered with much of the Article XXII work already completed. Thus the case before us falls in an area which the Supreme Court did not pass upon in *National Woodwork.* We must therefore consider

whether this control circumstance calls for a different result either with respect to "entering into" a contract with a work preservation clause, or in relation to its enforcement. There has been considerable post *National Woodwork* litigation centering on enforcement of work preservation clauses where the contracting employer had no right to control. The Board position in this area is now well established. Accordingly we will treat with that phase of the problem first.

1. The alleged 8(b)(4)(B) violation

In the cases following *National Woodwork* where the contractors have had no right to control the products coming to the jobsite the Board has consistently found pressures to enforce work preservation clauses to be conduct violative of Section 8(b)(4)(B). The Board has reasoned that in such situations the contracting employer was not really the primary employer, because he was powerless to grant the union demand. Therefore he must be deemed a neutral, and the union's efforts secondary. The demand could only be met by having the manufacturer or supplier either cease to do business altogether with the contractor, or change his mode of operation to accord with the union requirement. Pressure to attain either result was viewed by the Board as a proscribed secondary object.

This approach was not accepted by Courts of Appeal in some circuits.[8] The reasoning of these courts centered

[8] *N.L.R.B. v. Local Union 164, I.B.E.W.*, 388 F.2d 105 (C.A. 3); Local 636, *Plumbers Union, (Mechanical Contractors Association of Detroit, v. N.L.R.B.* 430 F2d 906, 74 LRRM

on their view that after *National Woodwork* it became improper for the Board to regard a contracting employer's right of control as sufficient in and of itself to make him a neutral in the dispute. In *Local 742 Carpenters,* the Court of Appeals for the District of Columbia expressed its views as follows:

> The Board's test flies in the face of *National Woodwork* in three respects: (1) It elevates one circumstance — where the immediate "control" lies — to *per se* status, rather than evaluating "all the surrounding circumstances." More than mere form is at stake here. The Supreme Court properly recognized that realistic assessment of the union's objective in a particular situation is a complex, subtle matter and must depend on a variety of evidential factors. A mechanical *per se* rule simply cannot sift and weigh the evidence with the required sensitivity. (2) A more basic failing of the "right to control" test under *National Woodwork* is that it focuses on entirely the wrong set of circumstances. It is concerned solely with which party presently has the power to satisfy the union's objective, rather than focusing on the substance of the object itself. Thus it misses the point of the primary-secondary distinction as set forth in *National Woodwork.* (3) And more particularly, the Board's test fails to evaluate the substance of the union's objective by looking to see whose labor relations it is addressed to. That is the

2851 (C.A.D.C.): *American Boiler Manufacturers Association v. N.L.R.B.,* 404 F.2d 556 (C.A. 8); *Local 742 Carpenters Union (J.L. Simmons Co.) v. N.L.R.B.,* 444 F.2d. 895, 76 LRRM 2979 C.A.D.C.).

crucial matter under *National Woodword*. If the union's grievance has to do with some third party's relations with his employees, the pressure it exerts against its members' employer may well be secondary. But *National Woodwork* makes clear that, if the grievance has to do with the labor relations of the pressured employer with his own employees who are exerting the pressure, then the activity is probably primary and permissible under Section 8(b)(4)(B). The Supreme Court has held that an objective of preserving traditional work for the union's members with the pressured employer is definitely primary. The fact that the employer may have to cease doing business with another party to satisfy the union's demand is a permissible ancillary effect. Of course, there may be cases where the union's objective is not clearly, or only partly, to preserve its member's work. But the *per se* "right to control" test would declare an activity to be secondary without any inquiry whatever into such matters.

In the instant case full acceptance of the rationale of these cases could lead to a holding that the execution and enforcement of Article XXII was lawful. The Board, however, has expressed continuing disagreement with the approach taken by these courts. At the present time, the Court of Appeals for the Fourth Circuit has upheld the Board in its approach to the problem. The Board case in which its view has been most fully explicated is *Local No. 438, Plumbers Union, (George Koch Sons)* 201 NLRB No. 7, herein called *Koch*. Since it is the Board's view that governs disposition of the issues here, we must take a somewhat detailed look at the Board's approach in

Koch, and then consider its applicability to the circumstances which confront us.

George Koch & Sons had a contract to manufacture and install certain industrial finishing systems in a General Electric Company plant. The contract with General Electric called for certain of the pipes to be prefabricated and pretested before being installed. Koch subcontracted the installation of all pipe at the General Electric plant to Phillips Plumbing & Heating Co. Phillips had a contract with respondent union which provided, in substance, that all pipe used on the job had to be cut and threaded by union members at the jobsite. The Board conceded that the contract clauses "are valid work preservation clauses and that in their actions alleged as violations here, the Respondents were motivated by work preservation aims . . ." When Koch shipped prefabricated pipe to the plant to be installed by the Phillips employees, the latter were instructed by their union to refuse to do the work because the prefabricated pipe did not meet the contractual requirement calling for jobsite cutting and threading. This conduct resulted in the filing of 8(b)(4)(B) charges. The Board found the conduct violative of the Act.

In its decision, the Board noted that Phillips, in contrast to Frouge in *National Woodwork*, had no control over the type of pipe he was to install. The contract between Koch and General Electric specified that in certain areas prefabricated pipe was to be installed. The work on such pipe had already been done when it reached the plant. Thus Phillips was powerless to assign the cutting and threading of such pipe to his own em-

ployees. The Board concluded that although a union might legitimately enforce work preservation clauses in situations like that in *National Woodwork*, it was foreclosed from doing so where the contracting employer had no power to award the work sought to be preserved. The Board reasoned that although the union may have been initially motivated by a work preservation aim in seeking the contract clause, it was now bringing pressure in a situation where the particular employer was incapable of acceding to the union demand. Since the pressured employer, even though also the contracting employer, could not give the union the work, his position became in effect that of a neutral. The Board stated:

> Since it was impossible for the pressured employer to itself accede to Respondent's actions but not impossible for another to award this work, and since we have deemed it reasonable to view the object of the Respondent's actions not as an impossible act, but as the possible alternative, we have found that the Respondent's actions were undertaken for their effects elsewhere, and that the pressured employer, here Phillips, was a secondary. Since Phillips was a secondary here, and since the Respondent's actions did have as an object the causing of Phillips to cease doing business with Koch, the Respondent's actions here violated Section 8(b)(4)(B) of the Act.

The Board went on to note that in finding the violation of Section 8(b)(4)(B) it was not passing on the Union's right to bring a civil suit for breach of contract. The Board further undertook to comment upon the scope of its disagreement with certain Courts of Appeal which

had had occasion to pass on cases involving a right to control issue. The Board denied that in considering cases of this nature it had ever looked solely at the pressured employer's right to control. In this connection the Board stated:

> Rather, the Board has always proceeded with an analysis of (1) whether, under all the surrounding circumstances, the union's objective was work preservation and then (2) whether the pressures exerted were directed at the right person, i.e., at the primary in the dispute. For the reasons set fort, *supra*, we think this approach fully conforms with *National Woodwork* and is in fact compelled by Section 8(b)(4)(B). In following this approach, however, our analysis has not nor will it ever be, a mechanical one, and in addition to determining, under all the surrounding circumstances, whether the Union's objective is truly work preservation, we have studied and shall continue to study, not only the situation the pressured employer finds himself in, but also how he came to be in that situation. And if we find that the employer is not truly an "unoffending employer" who merits the Act's protection, we shall find no violation in the Union's pressures such as occurred here, even though a purely mechanical or surface look at the case might present an appearance of a parallel situation. The evidence shows, however, that here Phillips was an unoffending employer and that by threatening to refuse and by refusing to install the prefabricated pipe for Phillips, the Respondents violated Section 8(b)(4)(B) of the Act.

The Board's decision was reviewed by the Court of Appeals for the Fourth Circuit, and on December 14, 1973, that court in *George Koch & Sons, Inc. v. N.L.R.B.*, 84 LRRM 2957, issued a decision fully upholding the Board. By way of further explication and support, the Court stated the following:

> The decisive question, therefore, is whether in the light of "all the surrounding circumstances" the agreements and boycott between Phillips and the unions were "tactically calculated to satisfy union objectives elsewhere." We think the Board was right in concluding that they were.
>
> To begin with, since the unions were aware of the conditions in the Phillips-Koch pact, they knew that Phillips did not have control of the pipe fabrication. Consequently, their enforcement of the collective bargaining terms evinces the union's intention to press their objectives "elsewhere" other than upon Phillips.
>
> Moreover, Koch and the unions were not in privity; neither was bounden to the other. Koch, then, was a neutral, and yet with regard to it the unions still sought to prosecute the conditions in order to "satisfy the union objectives" beyond Phillips. This, too, is precisely — and even more emphatically — the posture of the unions with respect to G.E. To repeat, these facts confirm the Board's finding of the tactical effect.
>
> These conclusions are not gainsaid or diminished by the unions' insistence that the stipulations are enforceable as work preservation measures. The

> Board did not nullify the clauses as work preservation assurances; they remained available for appropriate application. However, regardless of their initial intendment, they could by undue extension, over and above the Phillips-employee relationship, lead to violations of Section 8(b)(4)(B) of the Act.
>
> That the clauses have been so exerted in this instance is, it appears, precisely the illegality the Board perceived in the unions' actions. Like the Board, we see Phillips as not an "offender" but rather a neutral vis-a-vis its employees; therefore the effect of the strike was to compel Phillips unlawfully "to cease doing business with any other person." Granted, the efficacy of work preservation covenants is not to be stunted because of the severity of their impact . . . . Nevertheless, if a result of that pressure is to cause a neutral employer (here Phillips) to terminate his business with another (Koch), then such enforcement fouls the Act.

The Court went on to point out that its decision did not give an employer license to contract out work without limitation. The Court indicated that if there was any element of connivance or complicity in which the employer was seeking to avoid its obligations toward the union, then a different result would be reached. However, in the instant case, there was a contract between Koch and General Electric that controlled the type of pipe that was to come to the jobsite, and Phillips did not surrender his right to control for he never had any.

Although we will consider below the lawful nature

of the work preservation clause itself, the 8(b)(4)(B) violation within the *Koch* rationale does not depend on that determination. As noted above, the clause was not specifically attacked in *Koch*. *Koch* includes an express finding that the parties had a lawful work preservation clause in their contract.

In *Koch* we had Phillips bound by a contractor with a work preservation clause requiring certain traditional work to be done at the jobsite. The Butte contractors are also bound by a contract with Respondent Carpenters with a work preservation clause requiring that certain traditional carpenter's work be done at the jobsite by employees of the contractors. Phillips had no control over the pipes to be delivered to the jobsite for installation. Koch's contract with General Electric determined that some of the pipes were to be brought in a prefabricated state. The purchasers of modular houses engaged Butte contractors to install foundations or perform certain work on these houses after they had been placed on foundations. The Butte contractors had no control over the type of house to be placed on the foundation, or the condition in which such house would arrive at the jobsite. Summit Valley and Boise Cascade sold only completed modular houses with much of the work noted in Article XXII already finished. In *Koch*, the union refused to let Phillips' employees install the prefabricated pipe, relying on the provisions of their work preservation clause. In the instant case, Respondent Carpenters brought pressures against the contractors and their employees to refuse to work at all on Summit Valley or Boise Cascade modular houses unless and until the employees were given all the Article XXII

work. There was no way whatsoever that Phillips could give his employees the onsite pipe work. In response to union pressure, Phillips could do no more than attempt to persuade Koch or General Electric to change the basic format and give him nonfabricated pipe to install. If this were not possible, Phillips could only meet the pressure by ceasing to do business altogether with Koch at the General Electric project. There was no way that the Butte contractors could give the onsite carpentry work required by Article XXII to their employees. They could respond to the union pressure only by seeking to persuade Summit Valley or Boise Cascade to bring houses to the jobsite in the condition which Article XXII required, or else by ceasing to do any work on Boise Cascade or Summit Valley houses whatsoever. As in *Koch,* there is no showing in the instant case that the contractors surrendered any right to control this work assignment for they never had had it. The union in any *Koch* was apparently aware that Phillips had no control over the type of pipe which was to come to the jobsite. Respondent Carpenters must also have been aware that the contractors did not control the condition in which Boise Cascade or Summit Valley houses were shipped to a jobsite.

Under the circumstances, I see no difference in substance between the 8(b)(4)(B) issue presented to the Board in *Koch* and that before us in the instant case. Accordingly, I must conclude, as the Board did in *Koch,* that even assuming the work preservation clause to be valid and Respondent Carpenters to have been motivated by a work preservation aim, it, like the union in *Koch,* undertook to achieve its ends by the unlawful

means of bringing pressures against contractors who were incapable of acceding to their demands. As in *Koch*, and for essentially the same reasons, this conduct must be regarded as having been undertaken for its effects elsewhere, and the pressured employers must be deemed neutrals entitled to the protections of Section 8(b)(4)(B). Accordingly, I find that with regard to the various pressures heretofore found to have been directed against the contractors or their employees, Respondent Carpenters were undertaking to cause such contractors to cease doing business with Boise Cascade, Summit Valley, their agents or dealers, unless or until such employers changed their operations to conform to Article XXII, and that such pressures pursued for such a proscribed object constitute conduct violative of Section 8(b)(4)(i)(ii)(B) of the Act.

Having found Respondent Carpenters' pressures against the Butte contractors to be unlawful within the *Koch* rationale, there remains the question of whether a similar result follows with regard to the pressures directed against McLeod, Lemmons, the Boise Cascade employees, and Summit Valley. *Koch* tells us that the Butte contractors, like Phillips, are neutral employers, protected from pressures when they find themselves in a situation in which they are powerless to meet the Unions demands. The pressures against McLeod, the Boise Cascade employees and Summit Valley, even though having the same underlying work preservation aim, arise in a different context. Unlike the Butte contractors, Boise Cascade and Summit Valley could change their mode of operation and could manufacture and deliver houses which would leave the Article XXII

work for the jobsite carpenters. It is a fair assumption that in asking McLeod, the Boise Cascade dealer, to sign a contract with Article XXII, Cadigan was pursuing another means of pressing Boise Cascade either not to send its modular houses to the Butte area, or, if doing so, to bring them in with the Article XXII work still to be done at the jobsite. A similar aim seems likely with regard to the direct pressure Cadigan brought to bear on Lemmons and the Boise Cascade employees. Likewise, the picketing of Summit Valley was designed in part to press that employer, either to deliver the houses to the jobsite in a condition which conformed to Article XXII or else not to deliver them in the Butte area at all. Unlike the Butte contractors, however, neither Boise Cascade, Summit Valley, Lemmons, nor McLeod had ever had a contractual relationship with Respondent Carpenters covering any work to be done by their employees. To the contrary, Cadigan expressly disclaims interest in representing plant employees of either Boise Cascade or Summit Valley, while McLeod is a Butte realtor who has never directly employed carpenters.

Underlying *National Woodwork* is the concept that a union may protect traditional unit work of employees who are working for a particular employer. Necessarily this envisages the existence of an established bargaining relationship between the union and the employer, or there will be nothing that can be preserved. In *Koch* the Board carried the concept a step further holding the union, in effect, had no work to preserve when the employer, without connivance or complicity, was unable to give his employees the work because of circumstances beyond his control. If in a *Koch* situation the

pressures against a contracting employer be deemed secondary, similar pressures directed aganst a noncontracting employer present an *a fortiori* situation. Although the latter, unlike the former, might not be powerless to meet the union's demands, the pressure against him can scarcely be viewed as having a primary work preservation object, because no bargaining unit or bargaining relationship exists. The pressure is thus not addressed to the "labor relations of the contracting employer vis-a-vis his own employees" but must be seen as "tactically calculated to satisfy union objectives elsewhere" and therefore as secondary. The pressures here that were directed against the noncontracting employers may reasonably be viewed as having an object of forcing or requiring them either to bring houses into the Butte area with Article XXII work still to be done, or to cease bringing them in altogether. Either alternative would be a proscribed object. Accordingly, I find that by such pressures Respondent Carpenters has engaged in conduct violative of Section 8(b)(i)(ii)(B) of the Act.[9]

2. The allegation that entering into Article XXII was violative of Section 8(e) and Section 8(b)(4)(A)

The initial charges were limited to alleging viola-

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[9]To the extent the Board's decision in *Bricklayers Local 8, (California Concrete Systems),* 180 NLRB 43, appears inconsistent with this, I regard the rationale expressed therein as having been superseded by the more fully expressed rationale in the *Koch* case. In *California Concrete Systems* the Board indicated that a union might lawfully picket a general contractor who had control of sending in the prefabricated item, even though precluded from picketing the contracting

tions of Sections 8(b)(4)(B) and 8(b)(4)(D) by conduct relating to the enforcement of Article XXII. The Section 8(e) and 8(b)(4)(A) charges filed by the Chamber were made at a considerably later date. The General Counsel and the charging parties urge that the record supports a finding that "entering into" a contract with Article XXII is violative of the latter two sections. The Carpenters regards the lawful nature of the clause itself as already resolved by the *Silver Bow* case. The Chamber considers the 8(e) and 8(b)(4)(A) violations as the central issue in this proceeding. The Chamber undertook to adduce considerable testimony both through experts, and by others, to support its contentions, and made an elaborate and able presentation in its brief on the issues.

The Chamber notes that the Supreme Court in *National Woodwork* stated that resolution of a work preservation issue "cannot be made without an inquiry into whether, under all the surrounding circumstances, the union's objective was preservation of work . . . or whether the agreements and boycott were tactically calculated to satisfy union objectives elsewhere." The Chamber argues that such inquiry is required because *National Woodwork* makes it clear that in sanctioning a work preservation clause, the Court is not insulating

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employer who did not have such control. Although the Board did not deal directly with pressures directed against a noncontracting employer in *Koch*, for reasons which have been set forth above, I view the more fully explicated rationale in *Koch* with regard to work preservation cases as superseding any seemingly contrary expressions in *California Concrete Systems*. I believe the view which I have adopted above to be more consistent with the *Koch* rationale.

every contractual work restriction against an 8(e) ban. The underlying purpose of Sections 8(e) and 8(b)(4) is to limit the area of dispute to the primary disputants, and to avoid involving others therein, or disturbing business relationships a disputant may have with others. A work preservation clause, even where found lawful, necessarily has an incidental "cease doing business effect." This demands careful scrutiny of the "surrounding circumstances" whenever work preservation is claimed to make sure that the clause itself has a true work preservation object, and does not represent a subterfuge or a pretext covering an object elsewhere. The Chamber notes that in defining the "surrounding circumstances" the Supreme Court stated that such "might include the remoteness of the threat of displacement by the banned product or services, the history of labor relations between the union and the employers who would be boycotted, and the economic personality of the industry." The Chamber contends that to approach the issue in any given case, we must evaluate a union's conduct by considering the foreseeable consequences of its demand. It is urged that in determining whether its efforts to obtain a work preservation clause are bona fide and not "tactically calculated elsewhere," the proper test is one that involves objective considerations and does not depend upon any subjective hope or desire of the union. The Chamber defines its objective test as "one which deduces an unlawful objective from the foreseeable impact of the union's conduct without regard to the union's subject belief or motivation in securing the clause." While the Chamber would not ignore subjective considerations, or any evidence relating to a union's expressed purpose in

seeking a work preservation clause, it would not regard such considerations as controlling in the face of objective circumstances. Principal reliance would be placed on evidence relating to "the economic personality of the particular industry" and the "remoteness of the threat of displacement of the banned product or services . . . ." The Chamber's claim in this regard is expressed in the following language from its brief.

> Incorporation of these criteria clearly manifests an intention that among "the circumstances" to be considered in determining the legality of such clauses is a relative assessment of the probable impact of the clause upon the industry targeted for boycott against the "threat of displacement [of workers' jobs] by the banned product or services." Thus, if the threatened impact on jobs is slight as compared with the substantial impact on the producing industry, the clause will be considered as "tactically calculated to satisfy union objectives elsewhere." Conversely, if the "foreseeable consequences of the [clause upon the industry] while disruptive [is] slight," but the threatened impact upon jobs is substantial, the clause will be considered "primary" absent other indicia demonstrating an ulterior, unlawful secondary object.

The Chamber interprets the term "surrounding circumstances" to cover an exceedingly broad spectrum which would not only cover the situation in the United States as a whole. Evidence both from experts and others was received with regard to the Butte area and appears in the record in some detail. The undersigned, however, refused

to receive detailed expert testimonial and documentary evidence relating to the national construction industry in the belief that studies relating to prefabricated houses and restrictive union practices generally, were not sufficiently closely related to the particular issues in this proceeding, and were more properly addressed to a legislative than to a judicial tribunal.[10]

Before considering the contentions of the Chamber regarding the validity of its objective test we must first examine the assertions of Respondent Carpenters regarding its ostensible work preservation aims at the time it first voiced them and the posture of the case when the current charges arose.

The interest of Respondent Carpenters in possible problems arising from the entry of modular houses into the Butte area goes back to 1969 and the *Bender* case. The concern expressed by all union representatives in *Bender*, and in particular by Cadigan, clearly related to a fear that the arrival of fully built houses in the Butte area would diminish the amount of traditional craft work available to the Butte unions. Cadigan stated that

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[10]On April 25, 1974 the Chamber filed with the undersigned a motion for Leave to File Renewed Request to Administrative Law Judge to Reconsider Prior Rulings Rejecting Chamber's Exhibits 10(b) and 19. While such late request may properly be viewed as untimely, it has been fully considered by the undersigned. I am of the opinion that it raises nothing not heretofore fully considered that would serve to alter any of the findings herein or rulings theretofore made. Accordingly, although the request is granted to the extent of having given further reconsideration to the prior rulings, it is hereby denied insofar as receiving in evidence Exhibits 10(b) and 19 is concerned.

in resisting the arrival of prebuilt houses, "we are protecting the work of the people we are representing." Interstate, the manufacturer involved in *Bender*, was nonunion, and while Cadigan and other union representatives made statements indicating an awareness of this, the nonunion status of Interstate's employees does not stand out as the real problem which prompted the pressures. The Board's findings as a whole make it clear that the thrust of the union objectives in *Bender* centered not on that fact, but on the fear of loss of work by local union members. As we have seen, the Board found the union pressures unlawful because they had an object of forcing or requiring the Butte contractors to cease doing business with Bender or requiring Bender to cease doing business with Interstate. Pressures brought against the contractors were deemed unlawful following the same theory upon which I have found similar pressures against the contractors to be unlawful in the instant case. I do not view the case as a holding, however, that in 1969, the Carpenters necessarily were engaged in pursuit of an object other than work preservation.

It was noted by the Board in *Bender* that at that time none of the unions involved had a work preservation clause in its collective bargaining contract. It is questionable that existence of such a clause would have affected the result, since the Board speaks of Bender as being "powerless to meet" the demands, and of the unions' using "proscribed means" to keep out the Interstate houses. Nevertheless, when Respondent Carpenters' contract came up for renewal shortly after the Board's decision in *Bender*, Respondent Carpenters deemed it desirable, and probably necessary, if it were to

meet *National Woodwork* requirements, to negotiate a contract containing a work preservation clause. The Carpenters' three month strike for Article XXII was the subject matter of *Silver Bow*. The Carpenters' initial work preservation proposal in the negotiations was more extreme than that finally embodied in Article XXII. The Butte contractors had objected that the initial proposal would have the effect of preventing any modular houses whatsoever from entering the Butte area. The Board found Respondent Carpenters "consistently maintained that it was not interested in boycotting any product, including modular homes, whether union made or otherwise, but was only seeking to preserve the work historically and traditionally done by its member carpenters, employees of the contractor membes . . . ." Objections were also made that initial proposals would even keep out "precut" items which had theretofore been accepted. The Board found Respondent Carpenters had disclaimed such an intent, and expressed its aim as only "to prevent further erosion of their members' unit work by the subcontracting of additional tasks currently and traditionally performed by the carpenters." Subsequently during the course of negotiations, Respondent Carpenters rejected a counterproposal of the Butte contractors limiting the application of the proposed work preservation clause to situations where "the exclusive right to control the type of structure erected at the site of construction rests in a person, firm or corporation not a party to this agreement . . . ." It was following this that Article XXII in its present form was accepted. The Board made a further finding to the effect that representatives of four modular house manufacturers had

signified that it would be possible for manufacturers to supply unfinished houses with the Article XXII work to be done at the jobsite. With one exception however, all the manufacturers signified they were disinterested in doing so. As we have seen, the Board found Article XXII to be lawful within the meaning of *National Woodwork,* stating among other things that the "fact that Respondent was willing to modify its original proposal to liberalize it in several respects, so long as its objective of work preservation was retained, demonstrated Respondent's good faith in seeking only work preservation as distinguished from tactical objectives elsewhere, including product boycotts." Admittedly, however, the Board was not confronted with a right to control situation since at the time no effort had been made to enforce the provisions of Article XXII.

The General Counsel and the charging parties assert in this proceeding that *Silver Bow* does not preclude further consideration regarding the validity of Article XXII. I would agree that the decision does not make the matter *res judicata* or create a collateral estoppel. The Silver Bow decision can scarcely be ignored altogether, however. The Board had before it the full text of Article XXII, the background against which it arose, and the negotiations which led to its acceptance. It is a fair assumption that the good faith aims of Respondent Carpenters as they existed at the time and the true object it pursued were fully litigated. The timing of the case, of course, prevented any consideration as to what effects, if any, later enforcement efforts would have, or any consideration of events which occurred subsequent to the litigation. I am satisfied,

however, that it is a fair assumption that up to the time of the *Silver Bow* hearing, Respondent's true object was pursuit of a work preservation aim, and that theretofore it had engaged in no conduct which can be construed to support a conclusion that in seeking and initially obtaining Article XXII, it was pursuing a proscribed object.

There remains the question of whether the picture changed when Respondent Carpenters commenced enforcement of Article XXII in a manner which heretofore I have found unlawful. Also whether other subsequent events or the application of an objective test demands a finding that maintaining and enforcing Article XXII constitute a new "entering into" that is unlawful.

The Chamber views Article XXII as having the foreseeable consequence of making it all but impossible to market Summit Valley and Boise Cascade houses in the Butte area. Without a means of constructing foundations and doing needed stitching, modular homes cannot be sold there. If Butte contractors are forbidden to do this work, the Butte area must be abandoned as a market unless the manufacturers are prepared to bring in unfinished houses conforming to Article XXII. They regard this as impractical and uneconomical. While this "cease doing business" effect is viewed as having a "substantial adverse impact on the producing industry," the Chamber recognizes that such might still be deemed an incidental effect of a true work preservation object. Thus the central thrust of the Chamber's claim is that an objective evaluation of other circumstances indicates that a "relative assessment" of this "substantial ad-

verse impact" on the industry against the "threatened displacement [of workers' jobs]" by the advent of modular houses shows the likelihood of the displacement to be so slight that the true object is properly considered as "tactically calculated to satisfy union objectives elsewhere."

The Chamber notes the ostensible purpose of Article XXII is to preserve employment opportunities for carpenters. The Union pressing for it apparently views modular houses coming into the area as likely to cause a loss of such opportunities. This conclusion rests on the assumption that the onsite work on a fully finished modular house requires fewer manhours by carpenters than the same house if stickbuilt would require. Thus, an influx of modular houses into the Butte area is viewed as reducing the overall work left for carpenters, and Article XXII is addressed to obviating such a result. The Chamber challenges this line of reasoning as having no more than a superficial appeal, and claims that it actually rests on a false premise. To support this, the Chamber asserts that an objective economic analysis of the probable effects of the entry of modular houses does not show that in the long run carpenters' jobs will be reduced at all, but on the contrary, that such economic analysis establishes that the longrange result will be increased job opportunities not only for carpenters but also for workers in the Butte area generally. It is argued that a union pressing for Article XXII and responsible for the foreseeable consequences of its conduct, must be charged with responsibility of properly evaluating the economic effects of its conduct, and that, where such analysis shows jobs will not in fact be preserved, it is proper to

infer that the union has an object "elsewhere."

Extensive testimonial and documentary evidence was received relating to the "relative assessment" issue and the "economic personality" of the industry. In substantial measure, this has been outlined above. In addition to evidence relating to the production of modular houses as contrasted with stickbuilt houses, the area labor relations history, and other matters, there is considerable testimony from experts and others relating to the housing needs in Butte, together with economic analyses of past employment in the area, and projections with regard to future employment. The Chamber pressed for the introduction of even more elaborate economic data which related to a variety of economic factors dealing with the construction industry nationally. Proffered expert testimony, which appeared to have a national orientation as contrasted with a more direct relationship to the situation in the Butte area was rejected.[11]

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[11]Horace J. DePodwin and Glenn Meyers, two highly qualified economists, had prepared studies of broad scope regarding the functioning of the construction industry in the United States as a whole. The principal study was entitled, "The Economic Personality of the Construction Industry and the Need for Technological Change." This was an elaborately documented and scholarly treatise dealing with such items as the severe national housing shortage attributable to rising construction costs, the shortage of skilled craftsmen available to meet construction needs, and the fact that many of these problems came about because the construction industry was an antiquated one resisting innovations and permitting restrictive work practices. The study suggests industrialized housing to be a factor of great promise in cost

The factors in the record upon which the Chamber relies to support its so-called objective test include the following: (1) modular houses do not serve as a substitute for stickbuilt houses. There is an apparent demand for houses in the Butte area in the $18,000 to $25,000 price range, and it is impossible to market stickbuilt houses for less than $25,000. Therefore modular houses will not be competing with stickbuilt houses but will fulfill a market need not now being met; (2) some 100 modular houses came into the Butte area in the year immediately preceding the hearing. This represented some 30 percent of the houses built in the area. During the same period there was no slowing of unemployment among carpenters but, on the contrary, it appears there was a 20 percent increase of membership in the Carpenters; (3)

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reduction, since it brings about a far more efficient utilization of the work force. The study goes on to supply data purporting to signify that such industrialization promises an extremely favorable effect upon employment in the building trades, noting that many unions have accepted this as a fact and are working toward it. DePodwin and Meyers find that so long as virtually all construction must be performed at the jobsite, growth of lowcost housing will be restricted, and that this will have an adverse effect upon the very workers who undertake to impose such restrictions. This study and the supportive testimony of the economists who had prepared it was rejected primarily because it was not believed necessary to evaluate economic considerations on so broad a spectrum in order to resolve the issues with which we are immediately concerned. It was further believed that to permit the introduction of such matters would needlessly expand the record in a manner not required to reach a decision on the issues. In addition, it was felt that in substantial measure, the economic data covered by this study was of a nature more appropriately directed to a legislative

the manufacture of modular houses brings a new industry to Butte, an area whose history shows relatively scant growth. The jobs in the new industry give added income to residents which should have a beneficial effect in creating jobs for construction workers and others. Adherence to restrictive practices would on the contrary eliminate such an industry and contract the job market; (4) general economic theory applicable to Butte and elsewhere shows resistance to technological change to be unfeasible and generally counterproductive in the long run with respect to employment expansion even among the group pressing for it; and finally, (5) the work preservation concept itself rests on faulty economic predicates and whether applied in the Butte

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than to a judicial tribunal. For similar reasons, an additional paper entitled "A Theoretical Analysis of the Work Preservation Concept" prepared by the same economists, was also rejected. An interim appeal was taken from the undersigned's rejection of this proffered economic material. The rulling was initially sustained, but after the conclusion of the hearing, a motion for reconsideration of the ruling on the appeal was filed with the Board. This motion was denied. The Chamber in its brief now urges that I reconsider the matter, and reverse my earlier position. After giving careful consideration to the record as a whole, and to the arguments of the Chamber, I am still satisfied that the economic data in the record relating to the Butte area alone which, it may be noted does not appear in conflict with the broader economic conclusions covered by the studies, suffices to meet the mandate of *National Woodwork* regarding "surrounding circumstances" and the "economic personality" of the industry. Accordingly, I reaffirm my rulings made at the hearing rejecting all evidence purporting to have a national scope.

area or elsewhere it will not increase productivity or employment opportunities.

While the Chamber regards these objective considerations alone as sufficient to support a finding of a proscribed object, it joins with the General Counsel in asserting that Carpenters' enforcement efforts and other conduct also evidence pursuit of such object.

The enforcement incidents have been described above, and I have found that directed as they were against contractors powerless to comply, or against others not in privity of contract, the means of enforcement sufficed to show a proscribed secondary object. We have seen, however, by the holding in *Koch* that such a result can be reached without invalidating a work preservation clause. In view of this I do not regard the unlawful enforcement means used here as *per se* tainting an otherwise lawful work preservation clause. This result would appear to follow with regard to enforcement pressures directed at either contracting or noncontracting employers since both were undertaken in pursuit of the same goal.

There remains the question, however, of whether, since the hearing in *Silver Bow,* Cadigan, or any other Carpenters' representative, conducted himself in a manner which might suggest an object other than work preservation.

Cadigan was specific and positive in his assertions that Carpenters at no time pursued any object but preservation of traditional jobsite work. He expressly denied interest in representing plant employees of their Summit Valley or Boise Cascade. Cadigan was a forthright wit-

ness, and I credit both of these assertions. I see nothing in his testimony suggesting real concern with the organizational status of either manufacturer. Both plants were organized, with the Boise Cascade plant employees represented by another local of Carpenters International. Cadigan's references to modular houses as "scab products" or as "unfair" came in a context of attempted enforcement of Article XXII, and his approach as a whole appears keyed to getting the Article XXII work for the Butte carpenters with little concern for incidental effects this might produce. His references to these terms sound more in the nature of off-the-cuff remarks made in the common trade union vernacular than as expressions of a dual object. Considering the record as a whole I view Cadigan's general approach to Article XXII as evidencing a single-minded effort to further a sincerely held conviction that the advent of modular houses threatened employment opportunities of his carpenters.[12] I find no convincing evidence that in pursuing this course Cadigan was not acting in good faith, or that he was using such approach as a pretext to cover any other object.

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[12]It may be noted that in the fall of 1972 Cadigan had good reason to believe both Article XXII and its enforcement might be lawful. The initial *Silver Bow* decision had issued. The Board had indicated that enforcement of such a clause against a contractor without the right to control work assingment was unlawful, but several Courts of Appeal had emphatically disagreed. Moreover, *Koch*, with its full explication of the Board's view, had not yet issued.

3. Conclusionary findings as to violations of Sections 8)e) and 8(b)(4)(A)

The foregoing suggests that resolution of the 8(e) and 8(b)(4)(A) issues turns on an understanding of the true mandate of the Court when it directed an inquiry into the "surrounding circumstances." The Court is not specific on the question of "surrounding circumstances." The suggested considerations of "economic personality" or "threat of displacement" help but little, because the Court gives no real hint as to what these terms encompass. The Chmber seizes on these two terms as the key to its "objective test." It views the term "economic personality" as embarcing a broad concept of economic theory which must be considered in evaluating construction industry problems. Consideration thereof leads it to a conclusion that resistance to technological advancement in the form of a work preservation clause like Article XXII would not only hinder economic progress, but also would not preserve the jobs at which it was aimed. It asserts that the record sustains a conclusion that this very result will be forthcoming in the Butte area should Article XXII be found lawful. The evidence relied upon to support this is the expert testimony of economists relating to such matters as general economic theory, Butte housing needs, Butte population growth, and carpenters' job experience in Butte during the preceding year.

Of necessity expert testimony of this nature is in some measure speculative, and involves educated guesses as to future developments. I am satisfied that the Chamber's experts are well qualified, and that their

investigations, evaluations, and predictions relating to the effect of Article XXII and its enforcement are likely to be correct. Assuming this to be true, however, I am not convined that Carpenters are properly charged with knowledge of this as a "foreseeable consequence" of its pursuit of an otherwise lawful work preservation object.

This objective test as a controlling factor can only be sustained if we are justified in charging any union seeking a work preservation clause with knowledge of its economic consequences. The dissenting justices in *National Woodwork* saw Congress as viewing any product boycott as producing undesirable economic consequences and thus all "cease doing business" situations to constitute proscribed objects. The majority, however, saw the matter differently, and permitted pursuit of a true work preservation object, at least where no control issue existed. The entire Court, however, was considering a product boycott problem. Efforts to outlaw product boycotts generally center on the theory that they are economically unsound, and in the long run will have an adverse economic effect even on the party who has been pressing for one. It is difficult to envisage any product boycott situation which could successfully sustain itself against this long range argument of adverse economic consequences. The Chamber's test would charge a union with responsibility for knowing that adverse economic consequences would flow from its pursuit of a work preservation clause. The test would then say that, possessing such knowledge, continued pursuit of the clause could not be viewed as having the sole object of work preservation, since a union could not reasonably conclude that it would likely preserve jobs.

Therefore, the union's object must be deemed as aimed elsewhere, and viewed as secondary and unlawful. This is an approach that would have the practical effect of making it all but impossible to pursue a work preservation object even of the limited nature permitted by the majority in *National Woodword*. In substantial measure use of such an objective test would achieve the end found by the dissenting justices, but rejected by the majority. Moreover, regarding economic consequences the majority in *National Woodwork* spoke as follows.

> The Woodwork Manufacturers Associations, and amici who support its position, advance several reasons, grounded in economical and technological factors, why "will not handle" clauses should be invalid in all circumstances. Those arguments are addressed to the wrong branch of government. It may be "that the time has come for reevaluation of the basic content of collective bargaining as contemplated by the federal legislation. But that is for Congress. Congress has demonstrated its capacity to adjust the nation's labor legislation to what, in its legislative judgment, constitutes the statutory pattern appropriate to the developing state of labor relations in the country . . . ."

Accordingly, contrary to the claim of the Chamber I am satisfied that the Court's mandate is far more limited. The majority recognized that the inevitable "cease doing business" effect of its holding could lead to abuse. Therefore it directed careful scrutiny to insure that the lawful object was pursued in good faith. The nature of the industry, the setting in which the dispute

arose, the bargaining history, and various representations of union representatives were all "surrounding circumstances" that would throw light on the union's true object. Subterfuge or pretext might well be discerned from an examination of such factors. I am satisfied that the Court's mandate is thus limited, however, and that in any event it did not encompass an evaluation of the economic consequences in the manner urged by the Chamber.

In the instant case for reasons more fully set forth above I view neither the Carpenters' initial pursuit of Article XXII nor its subsequent "entering into" or enforcement efforts as sufficient to establish that the agreement itself has a proscribed object. Accordingly I find that it has not been established that "entering into" or maintaining Article XXII is conduct violative of Sections 8(e) and 8(b)(4)(A) of the Act, and I shall recommend that the allegations in this regard be dismissed.

It must be noted, however, that the foregoing holding is limited in scope. Nothing therein is to be construed as making Article XXII enforceable for all purposes. It is enforceable only in situations which parallel that in *National Woodwork* where the contracting employer has full control of the work assignment. In all other situations where the contracting employer is powerless to award the work, or the pressure is directed at a noncontracting employer or his employees, Carpenters may not press for Article XXII work within the rationale of the *Koch* case as set forth in the preceding section.

E. The Responsibility of Respondent Council for the Alleged Unlawful Conduct of Respondent Carpenters

As noted above, Respondent Council had not been charged with a violation of the Act prior to the issuance of the amended consolidated complaint in May 1973. The hearing opened on June 5, and after three days recessed until July 24. On July 9, the Chamber amended its charge, and on July 20, the General Counsel moved to amend the consolidated complaint by alleging, in substance, that "on or about October 5, 1972" Respondent Council "acting at the behest of and as agent" of Respondent Carpenters, "threatened employer members of Butte Contractors Association . . . with a work stoppage if they continued to perform work on modular homes" manufactured by Summit Valley and Boise Cascade until each of these manufacturers signed contracts containing Article XXII. This conduct was claimed violative of Section 8(b)(4)(ii)(A) and (B) and Section 8(e) because it was claimed to have the same proscribed objects as the pressures brought by Respondent Carpenters.

The motion to amend was argued on the record when the hearing reopened on July 24. Following argument, the undersigned denied the motion to amend, primarily because it appeared to serve no useful purpose since any remedy for the unlawful conduct of Respondent Carpenters would also enjoin persons acting as agents for the Carpenters or at its behest. Moreover, it appeared that joining the Council and litigating its responsibility at this point in the proceeding would have the effect of unduly prolonging the hearing. An interim appeal from

denial of the motion to amend was entertained by the Board. On July 27, my ruling was reversed, and I was directed to grant the motion to amend. Thereafter, I ruled that Respondent Council, as a result of the amendment, became a full party to the proceeding entitled to time to answer, time to examine the record already made, and to recall and reexamine witnesses that had already appeared if their testimony related to the allegations against the Council. To effectuate such rights, the hearing was recessed from July 27 to September 12. Thereafter, Respondent Council filed an answer, appeared by its counsel when the hearing reconvened on September 12, and participated fully in all aspects of the proceeding until the hearing closed.

When the hearing reconvened, Respondent Council, among other things, voiced objections to proceeding based on lack of due process. After extended argument on the record, these objections were ruled to be without merit. Due process objections were reiterated in Respondent Council's brief, filed after the close of the hearing. No purpose will be served by a detailed outline of such objections, or by discussion of each of the issues raised. Suffice it to say that a fair appraisal of the record including the time allowed, the opportunity afforded for examination of the previously made record, the granting of the right to recall witnesses, and the extent of actual participation in the remainder of the hearing, indicate that counsel was afforded a full opportunity to make its defense as to the allegations made against it. Under the circumstances, I find Respondent Council's objections, based on due process grounds, to be without merit.

The unlawful conduct charged against the Council relates only to a letter sent by the Council to certain contractors on October 5, 1972. Before considering the text of this letter, and the circumstances leading up to and following its sending, we must consider the nature of the Council itself and its relationship to Respondent Carpenters and the various construction industry unions that comprise its membership.

Respondent Council is an organization whose membership is comprised of the Butte area unions directly engaged in the building industry. It is affiliated with the Building and Construction Trades Department of the American Federation of Labor. The Council exists to protect the interests of the different trades represented, to serve as a forum to which the members can bring their individual problems, and to give its members aid and support in their organization and representation of employees where such is needed. Council membership in the Butte area includes some 15 unions. The Council is supported by a per capita tax paid by each affiliated union. The Council holds regular monthly meetings to which these unions send delegates. The delegates report their own individual problems at the meetings, participate in discussions thereof, and in turn report back to their own unions what has been discussed at Council meetings and what, if any, action the Council membership had voted to undertake. In addition to functioning as a forum for discussion, Respondent Council will on occasion act on its own in pursuit of the interests of its members. The *Bender* case provides an illustration of the Council assisting members in a move to limit the entry of modular houses into the Butte area. As we have

seen, the Council was joined as a party respondent in *Bender*, and the Board's cease and desist order ran against it as well as the member unions also named.

Ever since the *Bender* case, Council minutes reflect continuing discussions at Council meetings concerning various problems relating to the entry of modular houses into the Butte area. Frequently issues of this nature were brought up by delegates from the Carpenters. In the Council minutes of September 19, 1972, we find Cadigan reporting to the Council on problems he was having with Summit Valley at the time, and the minutes noting that the Carpenters "are fighting the methods they used here and ask support of" the Council. Thereafter, a motion was carried that the Council executive board meet on the matter as soon as possible. Minutes of executive board meetings of the Council are not kept, and it was not shown, when, if at all, the executive board ever met or considered this problem of supporting the Carpenters in their dispute with Summit Valley.

On October 5, 1972, the Council sent out a letter written on its own letterhead and signed by Mitchell Mihailovich, president. This letter reads in full as follows:

> NOTICE TO ALL CONTRACTORS:
>
> Please be informed the Southwest Building Trades Council has taken action that its membership will not work on construction projects with personnel whose International Union is not affiliated both locally and internationally with Building Trades Council, AFL-CIO.

> This action pertains to onsite construction and will be in effect commencing October 16, 1972.
>
> On the attached sheet are the unions who are affiliated both nationally and locally with the Building and Construction Trades Department, AFL-CIO.

The attached sheet lists the names of 15 unions represented as "nationally or locally" affiliated. The Teamsters is not such an affiliate, and its name is not on this list.

The General Counsel and the Charging Parties contend this letter to show that Respondent Carpenters had successfully enlisted the support of Respondent Council as its agent or ally in its fight to enforce Article XXII. It was noted that the letter was sent during the period when Respondent Carpenters had commenced steps to enforce Article XXII and after it had solicited Council support. As we have seen, Teamsters have a provision in its contract permitting Summit Valley employees to perform onsite work where necessary "to preserve and protect the integrity of the products manufactured." If the contractors were being prevented from performing the onsite foundation and stitching work, it was reasonable to assume this provision would be invoked, and that Summit Valley Teamster employees would be brought to the jobsite for such purposes. The letter and the omission of Teamsters from the "attached list" is thus regarded as a threat to contractors that on any jobsite where the "non-affiliated" Teamster employees might be called in to do the foundation and the stitching work, none of the other Council-affiliated

crafts would work with them and the marketing of the Summit Valley houses would be hindered.

Respondent Council denies that this letter had anything whatsoever to do with the Carpenters or any other matter relating to the Butte modular housing problem. According to Mihailovich, three of the local building trades unions, Asbestos Workers, Bricklayers, and Lathers, were at the time delinquent in their required per capita payments to Respondent Council. Mihailovich states that the letter was sent in part for the purpose of putting pressure on these delinquent unions to pay up their per capita tax and reinstate their local and national affiliation.[13] Mihailovich testified that the letter had an additional purpose which did relate to the Teamsters. The Teamsters, although not an affiliated Council member, was recognized as playing a role in the building trades industry. Mihailovich states that the Teamsters have the recognized jurisdiction to make all deliveries to jobsites. According to Mihailovich, however, on some of the larger jobsites, there will be truck driving limited to the jobsite alone which falls within the traditional jurisdiction of a craft working full time at the site. At about this time on some of the larger job-

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[13]In April 1972, the Council had sent letters to each of these three unions noting their delinquency and stating that, if they did not pay up, "the contractors . . . will be notified that the other crafts will no longer work with them." However, the names of all three of these unions appear on the October 5 "attached list," which would indicate that at that time each was regarded as affiliated. It was not shown that copies of the October 5 letter to the contractors were sent directly to these delinquent unions.

sites it had been reported that members of the Teamsters had been given full time jobsite driving. This was not deemed appropriate by the Council and Mihailovich asserts this was in part what the letter was protesting. It stands uncontradicted that the October 5 letter was sent only to four general contractors, each one of which was at work on a large construction project, not concerned with any aspect of residential construction. Mihailovich testified that he believed these four to be the only contractors at whose jobsite members of the delinquent unions were working, or the only ones with whom there were Teamster problems concerning onsite work.

In any event, the October 5 letter triggered a series of events which for the most part add confusion to the question of its real purpose. It is not shown that the letter directly brought about any work stoppages at any Summit Valley or Boise Cascade modular house sites, or indeed that any of the contractors who might have been engaged in such work even saw it. However, at least one of the larger contractors who received the letter reacted immediately and strongly.

Arthur G. McKee and Co. was a contractor working on a large construction project for Anaconda Company. Noting that the Teamsters were not on the list of affiliates attached to the October 5 letter, he viewed it as a threat that Council affiliates would order their members to leave his job if he continued to use members of the Teamsters. McKee promptly sent a telegram to the Building and Construction Trades Department in Washington, D.C. with whom Respondent Council is

affiliated. In this telegram, McKee signified that he did not know the reason behind the October 5 letter, stated that he wished to live up to his own obligations to all building trades unions, and urged that the Council's parent organization take whatever steps it could to resolve any existing problem in a manner which would avoid a work stoppage. No mention was made by McKee in this telegram of any problem involving modular housing. McKee's telegram seems to have had some initial effect since we find the following in the minutes of the regular meeting of Respondent Council on October 17, 1972:

> The letter concerning the Teamsters that was sent to the contractors was read and the telegram that McKee sent to the National Building Trades disputing this letter was also read. President Mihailovich reported we have been directed by the International to hold off on any action until they have a chance to check this out.

While the foregoing minute entry would seem to confirm that the October 5 letter related to the Teamsters, it is not inconsistent with the testimony of Mihailovich, nor does it necessarily signify that the Teamster problem involved modular housing rather than full time onsite driving. As described above, the Summit Valley picketing was commenced on October 12 and following the initial charges filed in this proceeding, such picketing and other coercive job action was enjoined by the District Court on November 8, 1972.

Although the McKee telegram had resulted in the Council's suspending any contemplated action, no

meeting to resolve the issues, whatever they might be, relating to the October 5 letter took place until November 16. This meeting was held in Butte and was attended by a representative of the Building Trades Department, by International and Local representatives of the Teamsters, by local representatives of the Council, and by Cadigan of Respondent Carpenters. It is not clear to what, if any, extent the issues of dues delinquency or the Teamsters driving full time on jobsites were discussed among those present. The testimony of Cadigan, Mihailovich and Roberts, a Teamster representative, suggests the principal subject of discussion to have been whether Summit Valley employees would be permitted to follow houses to jobsites. Teamsters' representatives stated affirmatively that their union had no interest in doing onsite work on any Summit Valley modular house so long as the building trades unions would undertake to do all that was needed to make the house habitable. Teamsters signified, however, that, should Respondent Carpenters or any other building trades unions make it impossible for contractors to do this needed work, the Summit Valley employees would follow the houses to the jobsites and do what was needed to make them habitable. The injunction was in effect at the time and Carpenters were not longer able to pursue efforts to enforce Article XXII against contracting or noncontracting employers. Cadigan, however, did signify that Carpenters had no interest in representing employees at the Summit Valley plant. Although an attempt was made to work out a written understanding between the Teamsters and the Council, efforts in this direction proved unsuccessful, and the meeting ended on a somewhat inconclusive note.

The foregoing scarcely presents a pattern of clarity. Consideration of the entire picture, however, does not convince me that it has been fully established that the conduct of the Council was sufficiently related to the modular housing problem that it may be held responsible either as an agent or ally of Respondent Carpenters in pursuit of the latter's unlawful objectives.

A close relationship naturally exists between a building trades council and its affiliates. Ever since *Bender* modular housing had been viewed by the Butte building trades unions, and especially by the Carpenters, as a problem. Understandably there had been continued reporting and discussions of matters relating to it at Council meetings. However, by September, the legality of Article XXII appeared to be established in some measure, and the Carpenters had undertaken some enforcement effort against the contractors which appeared to have been successful. The support mentioned in the Council minutes of September 19 as having been sought by Carpenters is not defined, and the record does not disclose, that the executive board of the Council ever discussed or decided on a course of action before October 5. While it is reasonable to assume that Respondent Carpenters might welcome support efforts from the other crafts through the Council, especially if the Teamsters were to commence doing some of the jobsite work on the Summit Valley houses, the real question is whether it is appropriate on the record before us to view the October 5 letter as an instrument of such support.

The text of the letter leaves its purpose in some

doubt. The General Counsel views it as aimed at adding the Council's "muscle" to the Article XXII enforcement efforts of Carpenters. However, if this be in fact its real purpose, why was it not specifically spelled out in the letter? Article XXII was viewed by the Carpenters and the Council as lawful at the time. There is no other apparent reason why either should try to disguise any joint or several efforts to have its terms observed. If the letter were to have an impact commensurate with the purpose which the General Counsel and Charging Parties attribute to it, why does it make no mention of Article XXII and the Summit Valley-Teamster Contract as the focus of and the reason for the threatened action? The record provides no good answers to these questions, and the explanations offered by the Council as to the purpose of the October 5 letter only add to the confusion. Possibly those drafting the letter were inept inasmuch as it is equally true that the asserted purposes relating to per capita delinquencies or Teamsters onsite driving were not specifically spelled out either. The confusion even becomes compounded in some degree when we note that at the November 16 meeting, which admittedly had resulted from the October 5 letter, the discussion centered on the Teamsters-Summit Valley aspect of the problem, and dwelt but little on the per capita and onsite driving issues.

This might leave the whole issue of purpose balanced in doubt were it not for the uncontradicted fact that the letter was sent to only four contractors, no one of which was involved in residential housing, or would be likely at any time to become involved in a modular housing problem. Carpenters was pressing to

make it impossible for Summit Valley houses to be marketed in the Butte area unless sent to jobsites in unfinished form. Carpenters could, and did, bring its own pressures against the Butte area contractors called upon to do needed carpentry work on Summit Valley's finished modular houses. The only contractors, however, who could possibly be affected would be those who undertook the sort of jobs required to make the Summit Valley houses habitable. Council support could expand these pressures against the same contractors. For the expanded pressure to be supportive, however, it had to be made known to those contractors who might engage in residential work of this nature. The October 5 letter was sent to none of them, but only to four larger contractors who apparently had no concern with residential housing whatsoever. This lends credence to the Council's assertion that despite the wording of the letter and despite any subsequent incongruities in the explanations, the letter was neither aimed at, nor intended to relate to the modular housing dispute and Carpenter's efforts to enforce Article XXII, and I so find.

Accordingly, I find that it has not been established by a preponderance of evidence that Respondent Council, acting either as agent or at the behest of Respondent Carpenters, sent the October 5 letter for any purpose relating to the modular housing dispute. I further find that, by such letter, Respondent Council did not threaten or coerce any contractor for any proscribed purpose within the meaning of Section 8(b)(4)(ii)(A) and (B) or Section 8(e). Therefore I shall recommend

that the allegations against Respondent Council be dismissed.[14]

F. The Conduct Alleged as Violative of Section 8(b)(4)(D)

The charges in 19-CD-212, the circumstances surrounding the picketing of Summit Valley, the injunction, and the 10(k) hearing and its result, have been referred to above. The economic pressures have been found violative of Section 8(b)(4)(B). But there remains the questions of whether such economic pressures shall also be regarded as violative of Section 8(b)(4)(D).

Following the 10(k) hearing, the Board in its Decision and Determination of Dispute issued on April 6, 1973,[15] ruled that there was "reasonable cause to believe that a violation of Section 8(b)(4)(D) had occurred, and that the dispute is properly before the Board for determination." The Board went on to hold that Teamsters were entitled to "the work of manufacturing or building of prebuilt or modular homes and other structures, including work necessary to make the structures habitable . . . ." Thereafter the General

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[14]On April 25 the Chamber moved for leave to file a reply brief on the issues relating to the Council's responsibility. The Rules and Regulations make no provision for reply briefs, and I would regard such request as untimely in any event. Nevertheless, I have read and considered the contents of the brief submitted and find nothing therein that would alter any findings or conclusions that I have made herein regarding the responsibility of the Council.

[15]*Carpenters Local 112 (Summit Valley Industries, Inc.)* 202 NLRB No. 153.

Counsel determined that Respondent Carpenters had not given an unequivocal indication of its intent to be bound by the Board's determination. Accordingly, the complaint before us was issued.

In the 10(k) determination the Board rejected Respondent Carpenters' claim that its pressures were exerted solely against Jovick, related solely to enforcement of Article XXII, and that no pressures were directed against Summit Valley to bring about a change in work assignment from Teamsters to Carpenters. With regard to the circumstances supporting its conclusion that there was reasonable cause to believe that a violation of Section 8(b)(4)(D) existed, the Board stated the following:

> Viewing the total circumstances of this case, we find that Carpenters' conduct went beyond merely attempting to enforce Article XXII against Jovick. By pulling Jovick's employees off the jobsite and threatening to picket [Summit Valley's] workmen if they followed their work to the jobsite and completed the work thereon, Carpenters, for all intents and purposes was preventing [Summit Valley] from delivering its product to its customers in salable condition. Only if [Summit Valley] drastically curtailed its inplant operations and delivered the components of each modular house to the jobsite so that Carpenters would then do the work guaranteed by Article XXII, Section 3(a), in other words, reassign its plant work from Teamsters to Carpenters, would Carpenters remove pressure from [Summit Valley] and its subcontractor, Jovick.
>
> Corroborative of Carpenters' unlawful objective is

> the evidence of a more direct pressure placed on [Summit Valley] by Carpenters. The record clearly shows that Carpenters picketed [Summit Valley's] plant for the express purpose of effecting a reassignment of the prefabrication of the modular houses from workmen represented by Teamsters to workmen represented by Carpenters, either on the jobsite or in the plant. Cadigan in fact admitted that the picketing would have ceased had the inplant work been given to members of Carpenters. Furthermore, Cadigan testified that additional picketing and hand-billing would take place if Teamsters insisted on following the work to the jobsite.

Respondent's letter to the Regional Director, which is quoted above, clearly does not signify an unequivocal intention upon the part of Carpenters to abandon the position taken by the Carpenters in the 10(k) proceeding and subsequently rejected by the Board. The Carpenters neither urged, nor does the record disclose, any newly discovered evidence which would indicate that there appears that all matters relating to the work assignment question were previously considered and have been decided by the Board. Indeed, nowhere in its brief does Carpenters urge or argue to the contrary. Although Carpenters has asserted in this case that it has no interest in representing employees in the Summit Valley plant, it made a similar representation in the 10(k) proceeding, and thereafter, including the hearing in the instant case, has failed to assert without equivocation that picketing of either the plant or the houses at the jobsite will be altogether abandoned. It is well settled that where no newly discovered evidence is

adduced, matters considered at the 10(k) hearing are not to be relitigated and the result theretofore found by the Board controls.[16]

Accordingly I find that Respondent by its picketing, and other unlawful pressures against Summit Valley, for reasons set forth above and heretofore found by the Board to constitute reasonable cause to conclude the conduct unlawful, and its refusal to comply with the Board's Decision and Determination of Dispute, has engaged in conduct violative of Section 8(b)(4)(i)(ii)(D) of the Act.

IV. The Remedy

Having found that Respondent Carpenters have engaged in unfair labor practices within the meaning of Section 8(b)(4)(i)(ii)(B) and Section 8(b)(4)(i)(ii)(D) of the Act, I shall recommend that it ceases and desists therefrom and takes certain affirmative action designed to effectuate the policies of the Act.

The Chamber urges that the nature of the violations calls for remedies that depart from those normally given. These would include a so-called "broad" cease and desist order, physical expungement of Article XXII, and widespread dissemination of the notice by having it read to members, mailed to contractors bound by Article XXII, and published in a local newspaper. In addition

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[16] *International Brotherhood of Electrical Workers, Local 3 (Mansfield Contracting Corporation)* 206 NLRB No. 84, *Bricklayers Local 1 (Shelby Marble and Tile Co.) v. N.L.R.B.*, 475 F.2d. 1116, 82 LRRM 2746 (D.C. Circuit, 1973).

the Chamber urges recision of fines assessed for violations of Article XXII, or refunding if the fines had been collected, and restoration of union membership if expulsion has occurred.

The order will enjoin pressures against not only contractors who have been pressured to date, but also will enjoin pressures against all contractors and other persons whose connection with the modular housing industry might subject them to the effects of such conduct. Having found Article XXII lawful on its face, it, of course, cannot be expunged, but it has been made clear above that such holding is a limited one, and Article XXII enforcement efforts may be undertaken solely in situations where the contracting employer has control over work assignment.

I see no reason for departure from the usual posting practice with regard to the notice. The members will be sufficiently apprised of the holding thereby, and there is no reason to believe that they, or the local, will not abide by the requirements of the order. I have found that Carpenters sought Article XXII in good faith, and that at the time it undertook the enforcement efforts herein found to have had a proscribed object, Carpenters had some reason to believe such might be lawful. Carpenters has been enjoined from enforcement of Article XXII by court order since November 1972. It does not appear that the injunction had unusual dissementation, and it has not been shown that Carpenters or their members have not complied therewith, or that Summit Valley or Boise Cascade have been confronted with difficulties in marketing their houses in the Butte area during this period.

The record indicates that in some instances fines were imposed on union members for violations of Article XXII. It is not altogether clear if any such fines were collected after the injunction. In any event I shall recommend that such fines be rescinded, and the amounts be refunded if they have been collected. In addition if union membership has been denied for the same reason, I shall direct that it be restored.

Although I have found insufficient evidence to hold Respondent Council responsible, the record fully establishes its function and the close relationship it has to Respondent Carpenters and the other building trades unions. The cease and desist order against Respondent Carpenters clearly prohibits it to use any persons as its agents or allies in carrying out any of the proscribed conduct, and to the extent it should undertake to do so, the order is to be construed as enforceable against such agents or allies.

Upon the basis of the entire record, I make the following:

Conclusions of Law

1. Respondent Carpenters and Respondent Council are, and have been at all times material to the issues in these proceedings labor organizations within the meaning of Section 2(5) of the Act.

2. Silver Bow Employers Association and Butte Contractors Association and their employer members, as well as any other parties who are signatory to a contract between Respondent and such associations, are each employers within the meaning of Section 2(2) of the

Act, and are engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

3. By a variety of economic pressures relating to enforcement of Article XXII of Respondent Carpenters' collective bargaining agreement which as found above were directed at contracting and noncontracting employers or their employees, Respondent Carpenters has engaged in conduct violative of Section 8(b)(4)(i)(ii)(B) of the Act.

4. By economic pressures including picketing directed at Summit Valley, as found above, Respondent has engaged in conduct violative of Section 8(b)(4)(D) of the Act.

5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

6. By entering into a contract containing Article XXII with Silver Bow Employers Association and Butte Contractors Association, Respondent Carpenters did not engage in conduct violative of Section 8(e) and Section 8(b)(4)(i)(ii)(A) of the Act.

7. By sending the letter of October 5 to certain contractors, Respondent Council did not engage in conduct violative of Section 8(b)(4)(ii)(A) or (B) or Section 8(e) of the Act.

Upon the basis of the entire record, the findings of fact, and conclusions of law, and pursuant to Section

10(c) of the Act, I hereby issue the following recommended:[17]

ORDER

Respondent, its officers, agents, and representatives, shall:

1. Cease and desist from:

(a) Inducing or encouraging any employee to refuse to work on, handle or transport any modular house, or threaten or coerce any person, including Butte area contractors or any other employer engaged in some aspect of constructing, transporting, or handling modular houses, where in either case an object of such pressures is to force or require the Butte area contractor, or any other person, to cease working on a modular house at a jobsite, either altogether, or unless and until such house be brought to the jobsite in a condition which conforms to Article XXII of the contract; or where an object is to force or require the manufacturers of modular houses either to cease bringing such houses into the Butte area altogether, or to change their mode of operation so that such houses are brought to Butte area jobsites in a condition that conforms to Article XXII of the contract.

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[17]In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

(b) Refusing to comply with the Board's Decision and Determination of Dispute by picketing, or other economic action, directed at Summit Valley, or any other person, where an object is to force or require Summit Valley to assign carpentry work, whether in-plant or onsite, to employees who are members of Respondent Carpenters, rather than to employees who are members of Teamsters.

2. Take the following affirmative action which I find to effectuate the policies of the Act:

(a) Post in conspicuous places at Respondent's business offices, meeting halls, and all other places where notices to members are customarily posted, copies of the notice attached hereto and marked "Appendix."[18] Copies of said notice, on forms provided by the Regional Director for Region 19 shall, after having been duly signed by Respondent Carpenters' authorized representatives, be posted by Respondent Carpenters immediately upon receipt thereof and be maintained by it for 60 consecutive days. Reasonable steps shall be taken by Respondent Carpenters to insure that said notices are not altered, defaced or covered by any material.

(b) Rescind any fines assessed, refund any fines

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[18]In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

collected and restore membership status in any case where union members have been penalized for engaging in conduct deemed by Respondent Carpenters to have been violative of Article XXII of its existing contract.

(c) Sign and mail sufficient copies of the notice to the aforesaid Regional Director for forwarding to any employer involved in the construction or transportation of modular houses destined for Butte area jobsites for posting by them, if they are willing, in all locations where notices to employees are customarily posted.

(d) Notify the Regional Director for Region 19 in writing within 20 days from the date of this Order what steps Respondent Carpenters is taking to comply herewith.

It is further recommended that the allegations of the complaint alleging violations by Respondent Carpenters of Sections 8(e) and 8(b)(4)(i)(ii)(A) be dismissed, and that the allegations alleging violations by Respondent Council of Sections 8(e) and 8(b)(4)(ii)(A) and (B) be dismissed.

signed Louis S. Penfield
Administrative Law Judge

APPENDIX

NOTICE TO MEMBERS

POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD

AN AGENCY OF THE UNITED STATES GOVERNMENT

WE WILL NOT induce or encourage any employee to refuse to work on, handle or transport any modular house, or threaten or coerce any person, including Butte area contractors, or any other employer engaged in some aspect of constructing, transporting, or handling modular houses, where in either case an object of such pressures is to force or require the Butte area contractors, or any other person, to cease working on a modular house at a jobsite, either altogether, or unless and until such house be brought to the jobsite in a condition which conforms to the requirements of Article XXII of the contract; or where an object is to force or require manufacturers of modular houses to cease bringing such houses into the Butte area altogether, or to change their mode of operation so that such houses are brought to Butte area jobsites in a condition that conforms to Article XXII of the contract.

WE WILL comply with the Board's Direction and Determination of Dispute on the work assignment issue, and will not picket or bring economic pressure against Summit Valley, or any other persons, where an object is to force or require Summit Valley to assign carpentry work, whether in its plant or at a jobsite, to employees

who are members of our union rather than to employees who are members of Teamsters Union Local No. 2.

UNITED BROTHERHOOD OF CARPENTERS & JOINERS OF AMERICA, LOCAL 112, AFL-CIO
(Labor Organization)

Dated _____ By _____
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 10th Floor, Republic Building, 1511 Third Avenue, Seattle, WA 98101, Telephone: (206) 442-4532

APPENDIX M

The CHAMBER OF COMMERCE OF the UNITED STATES of America for and on Behalf of its member BOISE CASCADE CORPORATION, Petitioners-Appellants,

v.

The NATIONAL LABOR RELATIONS BOARD, Respondent-Appellees.

SUMMIT VALLEY INDUSTRIES, INC., Petitioner,

v.

The NATIONAL LABOR RELATIONS BOARD, Respondent.

UNITED BROTHERHOOD of CARPENTERS & JOINERS of AMERICA, LOCAL UNION # 112 AFL-CIO, Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD, Respondent,

and

Chamber of Commerce of the United States of America, Intervenor.

Nos. 75-2064, 75-2166 and 75-2770.

United States Court of Appeals,
Ninth Circuit.

March 8, 1978.

Rehearing and Rehearing En Banc Denied
in Nos. 75-2064 and 75-2770
May 4, 1978.

Petitions were filed for enforcement of National Labor Relations Board's order finding violations of the National Labor Relations Act by union. The Court of Appeals, Trask, Circuit Judge, held that: (1) union's action in coercing and inducing subcontractor to stop work on modular home sites violated the Act, in view of fact that subcontractors had no control over the work assigned and (2) where union ordered its members to stop working on manufacturer's modular homes until such manufacturer complied with work preservation clause, union

placed picket at site of manufacturer's model home, but such manufacturer already had an agreement with another union for in-plant work and site work on its houses, union's initial actions against manufacturer and its threats of continued picketing after Board awarded manufacturer's work to another union violated the Act.

Order affirmed and enforced.

1. Labor Relations §249

Union's miscalculation of circumstances under which it can act to enforce a work preservation clause does not render the clause invalid.

2. Labor Relations §555

Evidence in unfair labor practice proceeding sustained finding that union's purpose in contracting for work preservation clause was to preserve work traditionally done by union, and therefore, such clause did not violate the National Labor Relations Act. National Labor Relations Act, § 8(e) as amended 29 U.S.C.A. § 158(e).

3. Labor Relations §395.1

The "right to control test" says that a union violates National Labor Relations Act when it coerces an employer to assign work to union when that employer has no control over the work; the right to control test is not a per se test, and other surrounding circumstances are taken into consideration. National Labor Relations Act, § 8(b)(4)(i, ii)(B) as amended 29 U.S.C.A. § 158(b)(4)(i, ii)(B).

See publication Words and Phrases for other judicial constructions and definitions.

4. Labor Relations §395.5

Union's action in coercing and inducing subcontractors to stop work on modular home sites violated National Labor Relations Act, in view of fact that subcontractors had no control over the work assigned. National Labor Relations Act, § 8(b)(4)(i,ii) (B) as amended 29 U.S.C.A. § 158(b)(4)(i, ii)(B).

5. Labor Relations §395.7

Where union ordered its members to stop working on manufacturer's modular homes until such manufacturer complied with work preservation clause, union placed picket at site of manufacturer's model home, but such manufacturer already had an agreement with another union for inplant work and site work on its houses, union's initial acts against manufacturer and its threats of continued picketing after National Labor Relations Board awarded manufacturer's work to other union violated the National Labor Relations Act. National Labor Relations Act, § 8(b)(4)(i, ii)(D) as amended 29 U.S.C.A. § 158(b)(4)(i, ii)(D).

6. Labor Relations §681

Issue on appeal where National Labor Relations Board finds that conduct does not violate National Labor Relations Act is whether the Board had rational basis for its decision, and reviewing court should not displace Board's choice between two fairly conflicting

views, even though court would justifiably have made a different choice had the matter been before it de novo. National Labor Relations Act, § 1 et seq., as amended 29 U.S.C.A. § 151 et seq.

7. Labor Relations §578

Evidence before National Labor Relations Board sustained finding that letter sent by building trades council to general contractors did not violate the National Labor Relations Act. National Labor Relations Act, § 8(b)(4)(i, ii)(B) as amended 29 U.S.C.A. § 158(b)(4)(i, ii)(B).

Donald C. Robinson, Butte, Mont., for appellants-petitioners.

Elliott Moore, Washington, D.C., for N.L.R.B.

Paul T. Bailey of Bailey, Doblie & Brunn, Portland, Gerard C. Smetana, of Borovsky, Smetana, Ehrlich & Kronenberg, Washington, D.C., for intervenors.

Kenneth C. McGuiness, of Washingon, D.C., for amici curiae.

Before MERRILL and TRASK, Circuit Judges, and TAKASUGI,* District Judge.

*Honorable Robert M. Takasugi, United States District Judge, Central District of California, sitting by designation.

TRASK, Circuit Judge:

This case arises out of the continuing battle by labor

unions against prefabricated building materials that limit on-site construction work.[1]

The National Labor Relations Board found that the United Brotherhood of Carpenters and Joiners of America, Local No. 112 (the Union) violated Section 8(b)(4)(B) and 8(b)(4)(D)[2] of the National Labor Relations Act[3] in its activities attempting to enforce a work preservation clause.

The matter comes to this court on a petition by the Chamber of Commerce of the United States of America (the Chamber), for and on behalf of its member Boise Cascade Corp. (Boise Cascade), a petition by Summit Valley Industries, Inc. (Summit), and a petition by the Union. The Board is seeking enforcement of its order. The court ordered consolidation of these matters.

I.

Many years of peaceful collective bargaining agreements between the Union and the Silver Bow Employers Association in Butte, Montana, were disrupted in 1969 by the introduction of modular houses into the building construction market.

These modular houses were viewed with alarm by the Union and the local Building Trades Council because their use potentially reduced the amount of carpentry work needed at new home sites. When negotia-

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[1] *See* Leslie, *Right to Control: A Study in Secondary Boycotts and Antitrust*, 89 Harv. L.Rev. 904 (1976).
[2] 29 U.S.C. § 158(b)(4)(B) and § 158(b)(4)(D).
[3] 29 U.S.C. § 151 *et seq.* (the Act).

tions for a new collective bargaining agreement commenced in 1971 between the Union and Silver Bow Employers Association, the Union demanded a broad work preservation clause. No agreement could be reached initially and a three-month strike ensued. A limited work preservation clause, Article XXII, was eventually agreed upon,[4] bringing the strike to an end.

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[4]

ARTICLE XXII

Contracting or Sub-Contracting
or Work to be Done at the
Site of Construction

SECTION 1. Application. The Employers are in the construction industry and both parties have elected to come under the proviso applicable to the construction industry contained in Title 29, Section 158(e) of the United States Code as amended.

SECTION 2. Scope of the Foregoing. Sections 1 and 3 of this Article relates to contracting or subcontracting and work to be done at the site of the construction, alteration or repair of a building structure or other work.

SECTION 3. (A) All of the following work shall be performed at the site of construction, alteration or repairing of a building structure or other work and shall not be subcontracted off the jobsite, unless said work is done at the Employer's shop.

(1) All the erection of the forms for basements and/or footings for the structures. Nothing herein shall be construed to apply to prebuilt forms which have, through past practice, been utilized by the Employers.

(2) The installation of all exterior siding or finishing, or, in the alternative, all wallboards and/or paneling.

(3) The installation of all exterior trim on the structure,

Subsequently, Silver Bow Employers Association filed charges that Article XXII violated Section 8(e) and that the Union violated Section 8(b)(4)(A) by striking to obtain it. The Board rejected these arguments, finding that Article XXII was a valid work preservation clause. *United Brotherhood of Carpenters, Local # 112 (Silver Bow Employers Assn.)*, 200 NLRB 205 (1972).

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or in the alternative, all interior trim on the structure.

(4) The installation of all interior doors on the structure.

(5) The shingling of all roofs, whether wood, metal, or composition material.

(6) Installation of all cabinets and shelving.

(7) The cutting and installation of all wooden stairs and/or bannisters.

(8) The installation of all form work for steps and/or stoops . . . .

(9) The placing and fastening of all components of the structure upon the foundation.

(B) Nothing herein shall apply to any structures in the following situations:

(1) (Omitted).

(2) When the construction work done by the Employer at the site of a pre-assembled or pre-built single family dwelling unit consists of building independent structures such as garages or other structures that are not part of the unit itself.

(C) No Employer shall be discriminated against, nor adversely affected by the Union, for accepting and completing any subcontracted work that conforms to Paragraph A of this Article.

(D) Nothing herein shall be construed to restrict work by carpenters or contractors when pre-fabricated or pre-built components of construction not listed in Paragraph A are utilized, installed or assembled at the site of construction.

After the validity of the clause had been established, the Union attempted to enforce the clause. It is the method of enforcement and the parties at whom the enforcement was directed that create the basic issues here.

A Butte contractor, Jovick Construction Co., a signatory of the Union agreement, contracted to build a house foundation and garage. These were for a Summit modular house. The Union's business agent, Cadigan, went to the site and ordered a worker off the job because the work was for a modular house. Jovick, a member of the Union, continued to work on the house. The Union brought charges against him, suggesting the maximum penalty.

Cadigan similarly approached Union members working for Perusich Construction, ordering them not to work on a Boise Cascade modular house.

Lutey Construction Co., another Butte contractor, was working on foundations for a Boise Cascade home-site. Lutey had been hired by Jack McLeod & Associates (McLeod), the Boise Cascade home franchise dealer in Butte. Cadigan ordered William Lutey, a carpenter employee, off the job, telling him Union members were not to work on modular houses. Lutey then left the job.

Other incidents involved Union pressure against parties who were not signatories to the collective bargaining agreement. Boise Cascade had contracted with Reed Lemmons, a house mover, to deliver houses to the Butte area. Cadigan visited a site where Lemmons and his crew were placing a house on its foundation. Cadigan was told that Lemmons' employees were not

unionized. Cadigan threatened to picket the site if they did not leave, because he said placing the houses on the foundations was work belonging to the carpenters' union.

Cadigan also confronted McLeod about the placing of modular houses on foundations. Cadigan made it clear to McLeod that (1) placing the houses on foundations was work belonging to the carpenters, (2) that no houses were to come into Butte unless partially finished as provided in Article XXII, and (3) that if McLeod was becoming a contractor, he would have to sign the Union contract or the Union would move to bar Boise Cascade houses from Butte.

Boise Cascade sent two employees, Garry and Pratt, to Butte from Pocatello, Idaho, to finish a Boise Cascade modular house. The two were members of the carpenters' local in Pocatello. Before starting work, they went to Cadigan to secure a clearance to work in the Union's jurisdiction. Cadigan refused to allow Garry and Pratt to work on the Boise Cascade house because Boise Cascade was not a signatory to the Union's agreement. Cadigan also threatened to picket if the men did start to work. The men then informed McLeod, the Boise Cascade franchise dealer, that they would not be allowed to work and returned to Pocatello.

Summit had a contract with its employees through the International Brotherhood of Teamsters, Local No. 2, Butte, Montana (Teamsters). After the Union pressured Jovick away from finishing Summit houses, Summit's employees began to do the finishing work. As a result, the Union started to picket a Summit model

home informing passers-by that carpenters had not been employed in constructing the building.[5]

Thereafter, Summit filed charges with the Board alleging that the Union was violating Section 8(b)(4)(D) by attempting to force Summit to reassign modular home work from the Teamsters to the Union. Pursuant to Section 10(k), the Board made a work jurisdiction dispute determination against the Union.[6]

As a result of that award to the Teamsters, the Union advised the Board that it would not require Summit to assign work in violation of its Teamsters contract, but added:

> That the Union affirms that it has the right, and will under some circumstances use its rights under the National Labor Relations Act, to truthfully advise the public, whether by picketing or other publicity that the Summit Valley Industries, Inc., does not employ members of, or have a contract with the United Brotherhood of Carpenters & Joiners of

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[5]The picket's sign read:

NOTICE
TO THE PUBLIC
THIS EMPLOYER DID NOT
EMPLOY MEMBERS OF
CARPENTERS UNION IN THE
WORK PERFORMED ON THIS
BUILDING. LOCAL 112
CARPENTERS UNION
AFL-CIO

[6]*United Brotherhood of Carpenters, etc. (Summit Valley Industries, Inc.)*, 202 NLRB 974 (1973).

America, Local 112, AFL-CIO, if, in fact, such is the truth and such picketing or publicity is for the sole purpose of advising the public of the situation.

The Board found that these actions of the Union violated Section 8(b)(4)(B) and 8(b)(4)(D) of the Act. Specifically, it was found that the Union violated Sections 8(b)(4)(i) and (ii)(B) when it instructed employees of Jovick, Perusich and Lutey to leave their jobsites. This constituted inducement to refuse to perform services with the object of exerting pressure against the modular house manufacturers. The Board further found that the Union violated Section 8(b)(4)(i) and (ii)(B) by encouraging or inducing Garry and Pratt, and Summit employees to cease working on modular houses and by threatening Lemmons, McLeod, Boise Cascade and Summit in order to cause the manufacturers to conform to Article XXII or cease bringing modular houses into Butte. In addition, the Board determined that the Union violated Section 8(b)(4)(D) by failing to comply with the Board's Section 10(k) award by refusing to unequivocally waive picketing to effect reassignment of Summit factory and jobsite work from Teamster-represented employees.

The Board ordered the Union to cease and desist the unfair methods of enforcing Article XXII. It was also ordered to comply with the Board's Section 10(k) work award. In addition, the Union was required to rescind all disciplinary actions, return fines and reinstate members where the Union members were penalized for working in violation of Article XXII.

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[7]The Board's decision is reported at 217 NLRB 902 (1975).

II.

The first issue that needs to be addressed involves the validity of Article XXII. The Chamber of Commerce, in its brief, argues that the Union sought Article XXII for an improper purpose violating Section 8(e).[8]

Section 8(e) makes it an unfair labor practice for unions and employers to enter into contracts whereby the employer ceases or agrees to cease doing business with any other person. But, under *National Woodwork Manufacturers Association v. National Labor Relations Board*, 386 U.S. 612, 635, 87 S.Ct. 1250, 18 L.Ed.2d 357 (1967) (*National Woodwork*), section 8(e) does not prohibit agreements made for primary purposes. This includes the purpose of preserving work traditionally done by the union.

The Board here found no Section 8(e) violation. Such a clause can be valid despite the fact some of the union's enforcement attempts violate Section 8(b)(4)(B). *National Woodwork, supra.* Article XXII was also adjudged a valid work preservation clause in *United Brotherhood of Carpenters, Local No. 112,* 200 NLRB 205 (1972). And, the Chamber conceded that on its face Article XXII was lawful.

[1] The Chamber argues though that the improper enforcement practices that followed prove that from its inception, Article XXII had an unlawful secondary purpose. Such an argument is foreclosed by the *National Woodwork* decision. In that case, the union tried to

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[8]29 U.S.C. § 158(e).

enforce a work preservation clause against three subcontractors who were not in a position to assign the work and one contractor who could. The enforcement attempts against the three subcontractors were found to be improper secondary activity. But, the enforcement against the general contractor, who had control over the work covered by the work preservation clause, was proper. This shows that just because the union miscalculates the circumstances under which it can act to enforce the clause, it does not render the clause invalid.

[2] The Board's findings are supported by sufficient evidence that in contracting for the clause, the Union's purpose was to preserve work traditionally done by the Union. This being a proper primary purpose, Article XXII does not violate Section 8(e).

III.

Determination of whether the Union violated Section 8(b)(4)(B) and (D) of the Act is controlled by *National Labor Relations Board v. Enterprise Association of Steam, Hot Water, Hydraulic Sprinkler, Pneumatic Tube, Ice Machine & General Pipefitters of New York and Vicinity, Local Union No. 638*, 429 U.S. 507, 97 S.Ct. 891, 51 L.Ed.2d 1 (1977) *(Pipefitters)*. That case reaffirmed the Board's use of the right-to-control test in disputes over enforcement of work preservation clauses. The right-to-control doctrine was used by the Board here and was an issue on appeal.

[3] Simply stated, the right-to-control test says that a union violates Section 8(b)(4)(B) when it coerces an employer to assign work to the union when that employ-

er has no control over the work. As pointed out by the Court in *Pipefitters*, 429 U.S. at 523, n. 11, 97 S.Ct. 891, the right-to-control test is not a *per se* test and other surrounding circumstances are taken into consideration. *See, e. g., Local Union No. 438, United Association of Journeymen nd Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO v. National Labor Relations Board*, 201 NLRB 59 (1973), *enfd. sub nom., George Koch Sons, Inc. v. National Labor Relations Board*, 490 F.2d 323 (4th Cir. 1974).

[4] Under this test, the violations of Section 8(b)(4)(B) seem clear. Section 8(b)(4)(i)(B) makes it unlawful for a union to "induce or encourage any individual employed by any person" where "an object" of that conduct is to cause an unlawful secondary boycott of another person. Similarly, Section 8(b)(4)(ii)(B) forbids a union from threatening, coercing or restraining any person for a secondary objective.

This improper coercion and inducement is found in the Union's orders for Jovick, Perusich and Lutey to stop work on modular homes and homesites. These parties were subcontractors on projects under which they had no control over the work assigned. This point, plus the other circumstances involved, justified the Board's decision that the Union's conduct was seeking to improperly pressure Summit and Boise Cascade. This would be improper secondary conduct.

Union pressure on Boise Cascade's subcontractor Reed Lemmons and franchiser McLeod also was seen by

the Board to have an improper secondary motive, violating Section 8(b)(4)(ii)(B).

Since the Board used the proper test as originally stated in *National Woodwork, supra,* and reaffirmed in *Pipefitters, supra,* the order of the Board as to these violations will be affirmed.[9]

IV.

[5] Section 8(b)(4)(D) forbids a union from inducing or encouraging anyone to strike in order to force any employer "to assign particular work to employees in a particular labor organization . . . rather than to employees in another labor organization . . ." Unlike Section 8(b)(4)(B), this section applies to both primary and secondary conduct. *Local 450, International Union of Operating Engineers, AFL-CIO v. Elliott,* 256 F.2d 630, 635 (5th Cir. 1958).

The Union in this case ordered its members to stop doing work on Summit houses until Summit, which had not signed the Union agreement, complied with Article XXII. In addition, the Union placed a picket at the site of a Summit model home. Summit already had an agreement with the Teamsters for in-plant work and site work on its houses. To comply with the Union's demands, Summit would have had to reassign a considerable amount of work to the Union.

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[9]429 U.S. at 527 n. 15, 97 S.Ct. 891. To the extent *Western Monolithics Concrete Products v. NLRB,* 446 F.2d 522 (9th Cir. 1971) is inconsistent, it cannot stand; particularly after resolution of the conflicts among the circuits in *Pipefitters.*

To resolve this conflict, the Board entered a Section 10(k) award giving the work to the Teamsters. *But, after the award, the Union threatened to continue picketing* the *site to enforce the claim rejected in* the *Section 10(k) award.* In its initial acts against Summit and its *further threats* against the manufacturers, the Union clearly violated Section 8(b)(4)(D) as found by the Board.

V.

During the Union action against the influx of modular houses, the Union requested the help of the Southwest Building Trades Council of Montana. This Council is composed of about 15 unions directly engaged in the construction industry.

One of the concerns expresses by the Council was the problem of Teamsters doing intra-jobsite driving. This driving traditionally goes to the craft unions working full-time at the site.

In response, the Council prepared the following letter:

> NOTICE TO ALL CONTRACTORS:
>
> Please be informed the Southwest Building Trades Council has taken action that its membership will not work on construction projects with personnel whose International Union is not affiliated both locally and internationally with Building Trades Council, AFL-CIO.
>
> This action pertains to onsite construction and will be in effect commencing October 16, 1972.

> On the attached sheet are the unions who are affiliated both nationally and locally with the Building and Construction Trades Department, AFL-CIO.

The Teamsters were absent from the list of affiliated unions.

The letter went to four general contractors not engaged in residential construction.

As a result of the letter, the Chamber filed Section 8(b)(4)(B) charges against the Council.

The Board agreed with the Administrative Law Judge's ruling that since the letter went to no one involved directly in the modular house dispute, there was no improper pressure being placed on the contractors.

[6] The issue on appeal where the Board finds that conduct does not violate the Act is whether the Board had a rational basis for its decision *International Ladies' Garment Workers v. National Labor Relations Board (McLaughlin Mfg. Corp.)*, 150 U.S. App.D.C. 71, 83, 463 F.2d 907, 919 (1972). It is well settled that a reviewing court should not "displace the Board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*." *Universal Camera Corp. v. National Labor Relations Board*, 340 U.S. 474, 488, 71 S.Ct. 456, 465, 95 L.Ed. 456 (1951), *National Labor Relations Board v. Holly Bra of California*, 405 F.2d 870, 872 (9th Cir. 1969).

[7] From the context in which the letter arose and the contractors to whom it was sent, it cannot be said that

the Board had no rational basis to support its conclusion that all petitions for review should be denied, and the Board's order should be affirmed and enforced. It is so ORDERED.

APPENDIX N

Section 10 of the Labor-Management Relations Act (29 U.S.C. §160)

(a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 158 of this title) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: *Provided,* That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this subchapter or has received a construction inconsistent therewith.

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency desig-

nated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided*, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by

the Supreme Court of the United States pursuant to section 2072 of Title 28.

(c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter. *Provided,* That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: *And provided further,* That in determining whether a complaint shall issue alleging a violation of subsection (a) (1) or (a) (2) of section 158 of this title, and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testi-

mony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an examiner or examiners thereof, such member, or such examiner or examiners as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.

* * *

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the

United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

* * *

(j) The Board shall have power, upon issuance of a complaint as provided in subsection (b) of this section charging that any person has engaged in or is engaging in an unfair labor practice, to petition any United States district court, within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of

any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.

(k) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4) (D) of section 158(b) of this title, the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed.

(l) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(A), (B), or (C) of section 158(b) of this title, or section 158(e) of this title or section 158(b) (7) of this title, the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall,

on behalf of the Board, petition any United States district court within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law: *Provided further,* That no temporary restraining order shall be issued without notice unless a petition alleges that substantial and irreparable injury to the charging party will be unavoidable and such temporary restraining order shall be effective for no longer than five days and will become void at the expiration of such period: *Provided further,* That such officer or regional attorney shall not apply for any restraining order under section 158(b) (7) of this title if a charge against the employer under section 158(a2) of this title has been filed and after the preliminary investigation, he has reasonable cause to believe that such charge is true and that a complaint should issue. Upon filing of any such petition the courts shall cause notice thereof to be served upon any person involved in the charge and such person, including the charging party, shall be given an opportunity to appear by counsel and present any relevant testimony: *Provided further,* That for the purposes of this subsection district courts shall be deemed to have jurisdiction of a labor organiza-

tion (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in promoting or protecting the interests of employee members. The service of legal process upon such officer or agent shall constitute service upon the labor organization and make such organization a party to the suit. In situations where such relief is appropriate the procedure specified herein shall apply to charges with respect to section 158 (b) (4) (D) of this title.

Opposition

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ALEXANDER L. STEVAS
CLERK

No. 81-497

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1981

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SUMMIT VALLEY INDUSTRIES, INC.,
a Montana Corporation

Petitioner,

vs.

LOCAL 112, UNITED BROTHERHOOD OF
CARPENTERS AND JOINERS OF AMERCIA,

Respondent.

----------o----------

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

----------o----------

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Paul T. Bailey
David S. Paull
BAILEY & PAULL
5441 S.W. Macadam Ave., #208
Portland, Oregon 97201
Telephone (503)221-0077
Attorneys for Respondent

QUESTIONS PRESENTED

Whether Attorney's Fees should be awarded to a Secondary Boycott Litigant who failed to seek such a remedy from the National Labor Relations Board, and under circumstances where the National Labor Relations Board would decline to impose such a remedy.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED. i

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT. 10

ARGUMENT:

In The Exercise Of Its Sound Judicial Discretion, The Court Should Deny The Writ Of Certiorari Sought By Petitioner. . . .14

A. A Section 303 damages proceeding brought soley for the purpose of recovering attorney's fees, invades the discretion of the National Labor Relations Board .14

B. Section 303 does not authorize an award of attorney's fees 19

C. There are no factual similarities between this case and cases which Petitioner contends are in conflict with the Mead holding, sufficient to justify this Court's exercise of discretionary review 24

CONCLUSION 29

APPENDIX

Excerpts of Decision of Administrative Law Judge, National Labor Relations Board (1974 unpublished decision) .App.2

TABLE OF AUTHORITIES

Cases Cited

Page

Alyeska Pipeline v. Wilderness Society, 421 U.S. 240, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975) 19

Capeletti Brothers, Inc., v. Local 487, 514 F.2d 1239 (5th Cir. 1975) 26

Carpenters Local 112 (Summit Valley Industries) 202 NLRB No. 153, 83 LRRM 1013 (1973) 9

F. F. Instrument Corp. v. Union de Tronquistas de Puerto Rico, 558 F.2d 607 (1st Cir. 1977) 26

International Union of Electrical Workers v. NLRB, 502 F.2d 349 (1974) 11 16

Local 984 v. Humko Company, 287 F.2d 231 (6th Cir. 1961), cert. denied, 366 U.S. 962 26

Mason-Rust v. Laborers, Local No. 42, 435 F.2d 939 (8th Cir. 1980) 26

Maxey v. Butchers' Union Local No. 126, 627 F.2d 912 (9th Cir. 1980) 25

Page

Mead v. Retail Clerks International Association, Local No. 839, 523 F.2d 1371 (9th Cir. 1975) 12 16, 17 18, 20 21, 24 25,

National Labor Relations Board v. Food Store Employees, Local 347, 417 U.S. 1, 94 S.Ct. 2074, 40 L.Ed.2d 612 (1974) 10 16, 18

Sheet Metal Workers International Association, Local No. 223, AFL-CIO v. Atlas Sheet Metal Company of Jacksonville, 384 F.2d 101, (5th Cir. 1967) 26

Summit Valley Industries, Inc., v. Local 112, United Brotherhood of Carpenters and Joiners of America, 475 F.Supp 665, (D Mont.. 1979) 9

Tiidee Products, 194 LRRM 1234, 1972, modif. enf. . . . 11 16

United Brotherhood of Carpenters and Joiners of America, Local 112, AFL-CIO, and Silver Bow Employers Association and Butte Contractors Association, 200 NLRB N. 42, 82 LRRM 1189 3

Statutes Cited

Labor Managment Relations Act, 29 U.S.C. § 141 8

Page

29 U.S.C. § 158(a) 23

29 U.S.C. § 158, Section 8(b)(4), Labor Management Relations Act of 1947. 16

29 U.S.C. § 187, Section 303, Labor Management Relations Act of 1947 9
10, 12
14, 16
19, 20
22, 23
24, 25

Miscellaneous Citations

McCormick, Damages Section 67 at 249 (1935) 20

Rule 17 (1)(a), United States Supreme Court Rules 28

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

SUMMIT VALLEY INDUSTRIES,
INC., a Montana Corporation,

Petitioner,

v.

LOCAL 112, UNITED BROTHERHOOD
OF CARPENTERS AND JOINERS OF
AMERICA,

Respondent.

On Petition for Writ of Certiorari
To The United States Court of Appeals
For The Ninth Circuit

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Respondent, Local 112 of the United Brotherhood of Carpenters and Joiners of America, has represented Butte Montana area Carpenters for a number of

years.

Respondent's collective bargaining agreement with area building contractors contains the following clause:

Article XXII, Sec. 3(A) reads in relevant part as follows:

> "All of the following work shall be performed at the site of construction, alteration, or repairing of the building structure or other work and shall not be subcontracted off the job site, unless said work is done at the employer's shop.
>
> "1. All the erection of the forms for basements and/or footings for the structures. Nothing herein shall be construed to apply to prebuilt forms which have, through past practice, been utilized by the Employers.
>
> "2. The installation of all exterior siding or finishing, or, in the alternative, all wallboards and/or paneling.
>
> "3. The installation of exterior trim on the structure, or, in the alternative, all interior trim on the structure.
>
> "4. The installation of all interior doors on the structures.
>
> "5. The shingling of all

> roofs, whether wood, metal or composition materials.
>
> "6. Installation of all cabinets and shelving.
>
> "7. The cutting and installation of all wooden stairs and/or bannisters.
>
> "8. The installation of all form work for steps and/or stoops. . .
>
> "9. The placing and fastening of all components of the structure upon the foundation.

The validity of this clause has been upheld by the National Labor Relations Board. 1/

Petitioner builds pre-fabricated homes. These homes differ from traditional stickbuilt homes in that they are constructed according to standardized plans, indoors, using overhead cranes and

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1/ United Brotherhood of Carpenters and Joiners of America, Local 112, AFL-CIO, and Silver Bow Employers Association and Butte Contractors Association, 200 NLRB No. 42, 82 LRRM 1189 (1972).

readily available power equipment of a diversified nature, on what is essentially an assembly line process. Often several houses will be in production at the same time. 2/

Modular homes arrive at a job site in a fully habitable condition. Prefabricated modules are literally stitched together after placement on the foundation, in order to conform to the design choice of the purchaser. 3/ The repetitive nature of the work enables Petitioner to staff its plant with job trained workers rather than journeyman and apprentice craftsmen, such as are demanded by job site construction of stickbuilt homes. 4/

In the construction of stick-

2/ Petitioner's Appendix A, App. 21.

3/ Id., at App. 22.

4/ Id., at App. 21.

built houses, carpenters traditionally and necessarily have performed all needed woodwork on the foundations and basements, all wood framing, all exterior and interior siding, all shingling and the installations of cabinets. When Petitioner's pre-fabricated homes are taken to a job site, where the foundation alone has been poured, only the foundation forms, the stitching, and some work on stairs, railings and doors remains to be done. All interior and exterior woodwork has been performed at Petitioners factory. 5/ As a consequence, there is less job site work for carpenters in the installation of a modular home than in the construction of a traditional stickbuilt home. 6/

Article XXII represents a

5/ Id., at App. 25.

6/ Id.

compromise between the party's competing interests. 7/ However disputes arose concerning its application. 8/

On October 3, 1972, an employee of Jovick Construction, Inc., (a Butte Contractors Association member and signatory to the collective bargaining agreement with Respondent) was engaged in the installation of shingles on the roof of a garage attached to a previously installed modular home built by Petitioner. Respondent considered this to be a violation of the Article XXII provision, since by merely digging the foundation for and/or attaching the garage to Petitioner's pre-fabricated homes, Jovick Construction was performing less than the minimum work specified by the

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7/ Id., at App. 9.

8/ Id.

contract. 9/

Consequently, Respondent refused to permit its members to make further installation of Petitioner's homes. 10/ Frank Jovick completed work on the garage himself. On two subsequent occasions, Petitioner's own employees completed on-site work which Jovick Construction was unable to complete. 11/

When Petitioner began assigning its own men, represented by Teamsters, to these projects, on October 11, 1972, Respondent placed one picket outside Petitioner's plant. The picket appeared on six days over a one month period. On November 8, 1972, Petitioner was granted a temporary restraining order. Jovick's employees then returned to work and the

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9/ Petitioner's Appendix B, App. 12.

10/ Id., at App. 10

11/ Id.

picket was removed. 12/

Unfair labor practice charges alleging an illegal secondary boycott were filed by Petitioner in October, 1972. 13/ In his opinion dated May 9, 1974, Administrative Law Judge Penfield found certain violations of the Labor Management Relations Act, 29 U.S.C. § 141 et seq (hereinafter "the Act") had occurred, but specifically found as follows:

> . . . I have found that Carpenters sought Article XXII in good faith, and that at the time it undertook the enforcement efforts herein found to have had a proscribed object, Carpenters had some reason to believe such might be lawful. Carpenters has been enjoined from enforcement of Article XXII by court order since November, 1972. It does not appear that the injunction had unusual dissemination, and it has not been shown that Carpenters or their members have not complied therewith, or that Summit Valley or Boise Cascade have been

---

12/ Id.

13/ Id., at App. 19

> confronted with difficulties in marketing their houses in the Butte area during this period." Decision of Administrative Law Judge, May 9, 1974. 14/

The National Labor Relations Board issued its affirming decision in the matter on May 12, 1975. 15/

Petitioner made no requests for attorney's fees in either proceeding.

The instant Section 303 action was filed by Petitioner in September, 1974, during the pendency of the above referred to National Labor Relations Board proceedings. 16/

Petitioner offered only one item of proof on the issue of damages. That

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14/ See Respondent's Appendix A, App. 6-7.

15/ Carpenters Local 112 (Summit Valley Industries) 202 NLRB No. 153, 83 LRRM 1013 (1973).

16/ Summit Valley Industries. Inc., v. Local 112, United Brotherhood of Carpenters and Joiners of America, 475 F.Supp 665, (D. Mont. 1979).

involved the time spent by Petitioner's plant manager in preparing for hearings on the injunction and the unfair labor practice charges. Because no work stoppage occurred, Petitioner presented no proof of damages relating to lost business opportunities, interruptions and delays. The trial court' ruling that Petitioner was not entitled to recover attorney's fees under Section 303, was upheld by the Ninth Circuit Court of Appeals. 17/

SUMMARY OF ARGUMENT

Petitioner's Section 303 damage proceeding, brought soley for the purpose of recovering attorney's fees, invades the discretion of the National Labor Relations Board.

The rule announced by this Court in National Labor Relations Board v. Food

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17/ Petitioner's Appendix A, App. 1-2.

Store Employees, Local 347, 417 U.S. 1, 94 S.Ct. 2074, 40 L.Ed.2d 612 (1974) invests the National Labor Relations Board and not the courts with the discretion to award the relief sought here by Petitioner.

In unfair labor practice proceedings, the National Labor Relations Board has consistently refused to grant attorney's fees to a prevailing party unless it can show that the charged party's defense is frivolous or in bad faith. Tiidee Products, 194 LRRM 1234 1972, modif. enf.; International Union of Electrical Workers v. NLRB, 502 F.2d 349 (1974). Petitioner however, seeks to recover reimbursement for attorney fees it never requested the National Labor Relations Board to award, and under circumstances where the Board would surely have declined to award them.

The Ninth Circuit properly denied the relief sought by Petitioner on

the basis of its decision in Mead v. Retail Clerks International Association, Local No. 839, 523 F.2d 1371 (9th Cir. 1975) The Ninth Circuit's holding in Mead correctly applies this Court's Food Store Employees rule by requiring courts to defer to the National Labor Relations Board in the matter of the award of attorney's fees in unfair labor practice actions.

To permit Petitioner and all other similarly situated employers to bypass the National Labor Relations Board and file Section 303 proceedings soley to recover their attorney's fees places a substantial and unnecessary burden upon the federal juridicary's already scarce resources.

This Court has held that in the absence of contract or statutue, attorney's fees cannot properly be awarded to a prevailing party. Contrary to

Petitioner's contention, Section 303 neither explicitly nor implicitly authorizes an award of attorney's fees. To infer that Congress intended Section 303 to serve this purpose is contrary both to the legislative history and case law interpreting the statute. Petitioner's arguments are properly addressed to Congress.

A review of the record demonstrates that any conflict between this case and the decisions of other Circuits, is brought about by a lack of factual similarity between the cases, and not by an erroneous decision on the part of the Ninth Circuit. These Circuits award attorney's fees only upon a showing of actual work stoppage and proof of substantial compensatory damages in relation to the amount of attorney's fees incurred. This case does not involve a work stoppage and Petitioner seeks

reimbursement for attorney's fees in excess of ten (10) times the amount of compensable damages awarded.

ARGUMENT

IN THE EXERCISE OF ITS SOUND JUDICIAL DISCRETION, THE COURT SHOULD DENY THE WRIT OF CERTIORARI SOUGHT BY PETITIONER.

A. A Section 303 damages proceeding brought solely for the purpose of recovering attorney's fees, invades the discretion of the National Labor Relations Board.

This court has ruled that the question of whether or not a prevailing party in proceedings before the National Labor Relations Board is entitled to its costs and attorney's fees in pursuance of unfair labor practice claims, is one which correctly rests with the National Labor Relations Board. In National Labor Relations Board v. Food Store Employees,

Local 347, 417 U.S. 1, 94 S.Ct. 2074, 40 L.Ed.2d 612 (1974), the court ruled as follows:

> "Congress has invested the Board, not the courts, with broad discretion to order a violator 'to take such affirmative action . . . as will effectuate the policies of [the Act].' 29 U.S.C. 160(c); see, e.g., Golden State Bottling Co. v. NLRB, 414 U.S. 168, 176 (1973). This case does not present the exceptional situation in which crystal-clear Board error renders a remand an unnecessary formality. See NLRB v. Express Publishing Co., 312 U.S. 426 (1941); Communications Workers v. NLRB, 362 U.S. 479 (1960). For it cannot be gainsaid that the finding here that Heck's asserted at least 'debatable' defenses to the unfair labor practice charges, whereas objections to the representation election in Tiidee were 'patently frivolous', might have been viewed by the Board as putting the question of remedy in a different light. We cannot say that the Board, in performing its appointed function of balancing conflicting interests, could not reasonably decide that where 'debatable' defenses, unfettered by the prospect of bearing his adversary's litigation costs, outweigh the public interest in uncrowded dockets." Id. at U.S. 8 and 9.

The National Labor Relations Board has consistently maintained its adherence to the rule that attorney's fees will not be awarded in Section 8(b)(4) actions unless the charged party's defense before the Board is frivolous or in bad faith. Tiidee Products, 194 LRRM 1234 (1972), modif and enf. International Union of Electrical Workers v. NLRB, 502 F.2d 349 (1974).

Consistent with this Court's decision in Food Store Employees, supra, and the National Labor Relations Board's general policy of refusing to grant attorney's fees to the prevailing party, the Ninth Circuit Court of Appeals has ruled that attorney's fees may not be recovered in actions under Section 303 of the Labor Managment Relations Act. 18/ Mead v. Retail Clerks International

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18/ 29 U.S.C. § 187.

Association, Local No. 839, 523 F.2d 1371 (9th Cir. 1975). The court in Mead held as follows:

> "If attorney's fees incurred in Board proceedings could be recovered in every case by subsequent section 303 action, it would circumvent the Board's rule allowing recovery of such fees only where the defense is frivolous or in bad faith. This case illustrates the point. In its present posture, the only portion of the judgment that could be sustained constitutes an award of precisely those attorneys' fees that the Board (and the Court of Appeals) would not make. Such a rule would also interfere with the Board's exercise of its 'broad discretion to order a violator "to take such affirmative action . . . as will effectuate the policies of [the Act]'. 29 U.S.C. 160(c)." Id. at 1381.

Petitioner's Section 303 claim for attorney's fees was denied based upon the holding in Mead.

The Mead decision identifies the appropriate forum for raising the issue of attorney's fees and correctly defers to the National Labor Relation Board's

judgment under the Tiidee Products rule, as to the appropriateness of such an award. It was clearly appropriate for the Ninth Circuit to deny Petitioner the relief sought on the basis of the holding in Mead, since at no time in proceedings before the National Labor Relations Board did Petitioner ever request that attorney's fees be granted, and because any award under the Tiidee Products rule, would most certainly have been denied given the administrative law judge's specific finding that Respondent acted in good faith belief that Article XXII of the bargaining agreement could be lawfully enforced. 19/

Petitioner's attempt to procure an extraordinary administrative remedy separate and apart from the appropriate forum contravenes the rule in Food Store

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19/ Respondent's Appendix, App. 4-7.

Employees and if approved by this Court, would invite the routine filing of post NLRB finding lawsuits which will unduly and unnecessarily burden the federal judiciary's already scarce resources.

B. Section 303 does not authorize an award of attorney's fees.

In the absence of a contract or statute specifically permitting the award of attorney's fees, the "American Rule" denying the same has been consistently upheld by this Court. Alyeska Pipeline v. Wilderness Society, 421 U.S. 240, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975). The majority opinion states:

> "Under this scheme of things, it is apparent that the circumstances under which attorney's fees are to be awarded and the range of discretion of the courts in making those awards are matters for congress to determine." Id. at U.S. 262

Petitioner contends that the "American Rule" is inapplicable because

the attorney fee award being sought under the compensatory damage language of Section 303 was incurred "in preceding litigation in obtaining a resumption of the status quo." (Petition for Writ pp. 14-15, fn. 33)

This contention was directly addressed and refuted by the court in Mead, supra, where it pointed out:

> ". . . [A]ttorneys' fees may not be recovered where the prior litigation involved the same parties, especially when the earliest action was instituted by Plaintiff to secure redress for Defendant's wrongful conduct." Id., at 523 F.2d 1380.

Were the applicability of the "American Rule" otherwise, prevailing parties, such as Petitioner herein, could avoid the rule entirely merely by instituting a new and separate suit. See McCormick, Damages, § 67 at 249 (1935). That result is particularly inappropriate where, as here, Petitioner claims no other

damages and had no other independent basis for bringing the action under Section 303 except to recover its attorney's fees and litigation related expenses.

Petitioner contends that to uphold the Mead decision, and to refuse to fashion the sought for remedy, gives labor organizations such as Respondent the opportunity to engage in "illegal activity with near impunity." (Petition for Writ p. 13). This assertion is patently erroneous given this Court's approval of and the National Labor Relations Board's adherence to the Tiidee Products doctrine, and the fact that in all proceedings before the National Labor Relations Board, Petitioner never once requested that attorney's fees be granted. If Petitioner had desired its legal expenses to be considered as an element of the remedy sought, it had only to address the matter to the Board.

Petitioner further contends that Section 303 impliedly requires the granting of attorney's fees as compensatory damages because effectuating resumption of work mitigates damages.

However, this rationale has no application to the facts of this case. Despite the fact the Petitioner has already obtained a judgment for $1,176 in litigation related expenses, it none the less seeks $13,604.33 in legal fees and costs as "mitigation" for union activities which did not result in a work stoppage and which did not result in one dollar of damage to Petitioner.

Nothing in the legislative history cited by Petitioner suggests that Congress contemplated that attorney's fees would be recoverable as Section 303 damages. Petitioner's argument that such damages should be written into Section 303 does not change the fact that Congress has

thus far not seen fit to do so.

An analysis of the statutory purpose of Section 303 and the Labor Management Relations Act of which it is a part, suggests that it was the intent of Congress to require labor organizations and employers to absorb their own legal fees. It is equally likely that a labor organization prevailing in its efforts to combat unfair labor practices by the employer (29 U.S.C. § 158(a)) may expend large sums of money toward legal fees, without reimbursement. The mere existence of an independent cause of action for compensable damages under Section 303 does not give rise to the inference that Congress meant to provide employers, but not labor organizations, the opportunity to be reimbursed for their attorney's fees incurred in fighting unfair labor practices.

Petitioner's attempt to read

into Section 303 a right to the granting of legal fees under the facts of this case is clearly erroneous. If the relief which Petitioner seeks is to be granted at all, it must be by Congress, and not by judicial action.

C. There are no factual similarities between this case and cases which Petitioner contends are in conflict with the Mead holding, sufficient to justify this Court's exercise of discretionary review.

The decisions of the First, Fifth, Sixth and Eighth Circuits cited by the Mead decision, do not, as Petitioner contends, "place [it] and other similarly situated enterprises in the Ninth Circuit outside th prevailing rule of law and the remedies afforded by it." (Petition for Writ p. 10).

The court in every cited decision focused upon a critical and

common factor, not presented by the facts of the instant case. Attorney's fees are considered to be items of compensable damage under Section 303 when incurred in a prior, terminated violation of Section 8(b)(4) only when they are necessary to mitigate the losses resulting from a work stoppage by affecting a resumption of work.

The cases which Petitioner cites simply illustrate and further reinforce the essential character of this "resumption of work" factor in the decisions of these Circuits. Attorney's fees were awarded upon the showing of an actual (and in most instances prolonged) work stoppage and proof of substantial compensatory damages in relation to the amount of attorney's fees awarded. 20/

20/ Mead, supra, (work stoppage - $12,798 compensatory damages: $750 attorney's fees); Maxey, v. Butchers' Union, Local No. 126,

In effect, Petitioner contends that had this case been decided by one of the other Circuit Courts cited above, the sought for relief would have been granted. It is doubtful given the following facts that the result would have been any different.

---

627 F.2d 912 (9th Cir. 1980) (work stoppage - $89,064.93 lost earnings: $3,395 attorney's fees); Sheet Metal Workers International Association, Local No. 223, AFL-CIO v. Atlas Sheet Metal Company of Jacksonville, 384 F.2d 101, (5th Cir. 1967) (work stoppage - $2,634.37 compensatory damages: $559.20 attorney's fees); Capeletti Brothers, Inc. v. Local 487, 514 F.2d 1239 (5th Cir. 1975) (work stoppage - $96,183.12 compensatory damages: $1,300 attorney's fees); Local 984 v. Humko Company, 287 F.2d 231 (6th Cir 1961) cert. denied, 366 U.S. 962 (work stoppage - total $84,136.30 compensatory damages: $2,000 attorney's fees); Mason-Rust v. Laborers, Local No. 42, 435 F.2d 939 (8th Cir. 1980) (work stoppage - $68,357.44 additional premium pay and show-up pay: $1,237.79 attorney's fees and expenses) The court in F. F. Instrument Corp. v. Union de Tronquistas de Puerto Rico, 558 F.2d 607 (1st Cir. 1977) supra, affirmed $4,626.78 in compensatory damages but refused to allow any of the $16,566 claimed as attorney's fees. In none of the other cases cited by Petitioner (Petition for Writ pp. 9-10, fn. 21-24) do the courts set out the breakdown between attorney's fees and other compensatory damages.

It is clear from the record that the union activity did not result in a work stoppage. The contractor finished the job in progess and Petitioner utilized members of the Teamster's Union to continue and conclude on-site work. At trial, Petitioner abandoned all claims for loss of business opportunities, interruptions and delays. The District Court did allow compensatory damages in the sum of $1,176, but this was merely to compensate Petitioner's plant manager for time spent in obtaining an injunction and in testifying at National Labor Relations Board hearings.

There is simply no authority for awarding attorney's fees in excess of ten times the compensable damages alleged by Petitioner under any of the decisions of the Circuits cited above.

In setting forth considerations governing review on Certiorari, United

States Supreme Court Rule 17(1)(a) states that among the character of reasons to be considered is that a Federal Court of Appeals has rendered a decision in conflict with another Federal Court of Appeals on the same matter. A review of the record herein demonstrates that any conflict between this case and the decisions of other Circuits is brought about by a lack of factual similarity between the cases and not by an erroneous decision on the part of the Ninth Circuit. Petitioner has failed to give reasons sufficient to justify this Court's exercise of discretionary review.

CONCLUSION

For each of the foregoing reasons, Petitioner's Writ of Certiorari should be denied.

RESPECTFULLY SUBMITTED this _____ day of November, 1981.

BAILEY & PAULL

Paul T. Bailey, David S. Paull

Paul R. Frisch

of Attorneys for Respondent

Appendix

APPENDIX

Excerpts of Decision of Administrative Law Judge, National Labor Relations Board (1974 unpublished decision)

APPENDIX

This Appendix is comprised of excerpts of the Opinion of Administrative Law Judge Louis S. Penfield which was issued May 9, 1974. The Opinion contained Judge Penfield's findings and conclusions on the unfair labor practice charges filed by various parties, including Summit Valley Industries, arising out of the transactions which were also the basis of Summit Valley's subsequent Section 303 damages action in the courts below. (Page numbers of the decisions from which excerpts are printed are noted).

JD-(SF)-74-74 Butte, Montana
UNITED STATES OF AMERICA, BEFORE THE
NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES, BRANCH OFFICE
SAN FRANCISCO, CALIFORNIA

UNITED BROTHERHOOD OF CARPENTERS &
JOINERS OF AMERICA, LOCAL 112, AFL-CIO
AND ITS AGENT, SOUTHWEST BUILDING TRADES
COUNCIL OF MONTANA, AFL-CIO
Respondents

and Case No. 19-CC-588

SUMMIT VALLEY INDUSTRIES, INC.

and Case No. 19-CC-591

JACK McLEOD & ASSOCIATES, INC.
Case No. 19-CC-604

and Case No. 19-CC-604-2

CHAMBER OF COMMERCE OF THE UNITED
STATES OF AMERICA, FOR AND ON BEHALF
OF ITS MEMBER BOISE CASCADE CORPORATION
AND ALL OTHER SIMILARLY SITUATED MEMBERS
Case No. 19-CE-21
Case No. 19-CD-212

James F. Kennedy, Esq., and Leslie S. Waite, Esq., for the General Counsel.

Poore, McKenzie and Roth, by Donald C. Robinson, Esq., of Butte, Montana, for Charging Party Summit Valley.

McCaffrey and Peterson by John L. Peterson, Esq., of Butte, Montana, for Charging Party McLeod.

Lederer, Fox and Grove, by S. Richard Pincus, Esq. and Lawrence M. Cohen, Esq., of Chicago, III., for Charging Party The Chamber.

Gerard C. Smetana, Esq., of Chicago, III., for Charging Party The Chamber.

Holland, Holland & Haxby, by Dave Holland, Esq., of Butte, Montana, for Respondent Carpenters.

Bailey, Doblie, Ceniceros and Bruun, By Paul T. Bailey, Esq., and Gerald C. Doblie, Esq., of Portland, Oregon, for Respondent Carpenters.

Benjamin W. Hilley, Esq., and Emily Loring of Great Falls, Montana, for Respondent Council

JD-(SF)-74-74

DECISION

Statement of the Case

* * *

Findings of Fact

* * *

III. The Unfair Labor Practices

The General Council and the charging parties assert in this proceeding that Silver Bow does not preclude further consideration regarding the validity of Article XXII. I would agree that the decision does not make the matter res judicata or create a collateral estoppel. The Silver Bow decision can scarcely be ignored altogether, however. The Board had before it the full text of Article XXII, the background against which it arose, and the negotiations which led to its acceptance. It is a fair assumption that the good faith aims of Respondent Carpenters as they existed at the time and

the true object it pursued were fully litigated. The timing of the case, of course, prevented any consideration as to what effects, if any, later enforcement efforts would have, or any consideration of events which occurred subsequent to the litigation. I am satisfied, however, that it is a fair assumption that up to the time of the Silver Bow hearing, Respondent's true object was pursuit of a work preservation aim, and that theretofore it had engaged in no conduct which can be construed to support a conclusion that in seeking and initially obtaining Article XXII, is was pursuing a proscribed object. (Decision pp. 32-33)

* * *

Considering the record as a whole I view Cadigan's general approach to Article XXII as evidencing a single-minded effort to further a sincerely held conviction that the advent of modular

houses threatened employment opportunities of his carpenters. 12/ I find no convincing evidence that in pursuing this course Cadigan was not acting in good faith, or that he was using such approach as a pretext to cover any other object.

* * *

IV. The Remedy

* * *

I see no reason for departure from the usual posting practice with regard to the notice. The members will be sufficiently apprised of the holding thereby, and there is no reason to believe that they, or the local, will not abide by the requirements of the order. I have

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12/ It may be noted that in the fall of 1972 Cadigan had good reason to believe both Article XXII and its enforcement might be lawful. The initial Silver Bow decision had issued. The Board had indicated that enforcement of such a clause against a contractor without the right to control work assignment was unlawful, but several Courts of Appeal had imphatically disagreed. Morever, Koch, with it full explication of the Board's view, had not yet issued.

found that Carpenters sought Article XXII in good faith, and that at the time it undertook the enforcement efforts herein found to have had a proscribed object, Carpenters had some reason to believe such might be lawful. Carpenters has been enjoined from enforcement of Article XXII by court order since November 1972. It does not appear that the injunction had unusual dissemination, and it has not been shown that Carpenters or their members have not complied therewith, or that Summit Valley or Boise Cascade have been confronted with difficulties in marketing their houses in the Butte area during this period. (Decision p. 46)

* * *

ORDER

* * *

Dated: May 9, 1974

/s/ Lewis S. Penfield

Administrative Law Judge

(Decision pp. 48-49)

Petitioner's Brief

Office - Supreme Court, U.S.
FILED
JAN 25 1982
ALEXANDER L. STEVAS,
CLERK

NO. 81-497

In The

Supreme Court of the United States

October Term, 1981

SUMMIT VALLEY INDUSTRIES, INC.,
a Montana corporation,
Petitioner,

vs.

LOCAL 112, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONER

DONALD C. ROBINSON
Poore, Roth & Robinson, P.C.
1341 Harrison Avenue
Butte, Montana 59701-4898
Telephone: (406) 782-1223
Attorney for Petitioner

Of Counsel: DOUGLAS A. BUXBAUM
Poore, Roth & Robinson, P.C.
1341 Harrison Avenue
Butte, Montana 59701-4898
Telephone: (406) 782-1223

COCKLE PRINTING CO., 2311 Douglas St., Omaha 68102

QUESTION PRESENTED

Whether the victim of an illegal secondary boycott is entitled to its attorney fees and related expenses of litigation, which were incurred by it to successfully effect a cessation of the boycott and a resumption of the enterprise in order to mitigate the harm caused by the illegal activity, as compensatory damages under Section 303 [29 U. S. C. § 187(b)] of the Labor Management Relations Act of 1947.

TABLE OF CONTENTS

	Page
Question Presented	i
Table of Authorities	iii
Opinions Below	1
Jurisdiction	2
Statutes Involved	2
Statement of the Case	4
Summary of Argument	10
Argument:	
I. The prevailing rule allowing recovery of legal expenses incurred to successfully effect a cessation of illegal activities, as compensatory damages under Section 303, should be adopted as the established rule.	12
A. The majority of decisions allows recovery of legal expenses incurred to effect a cessation of illegal activity as compensatory damages under Section 303.	12
B. The prevailing rule, allowing recovery of preemptive legal expenses as compensatory damages, is consistent with both the statute and congressional policy.	16
1. Section 303 contemplates recovery of all all actual compensatory damages.	16
2. Legal expenses incurred to effect a cessation of illegal activities and allow a resumption of work are compensatory dam-	

TABLE OF CONTENTS—Continued

Pages

ages within the contemplation of Section 303. ____ 16

3. The majority rule vindicates congressional policy expressed by Section 303. ____ 19

II. The Ninth Circuit erred in denying recovery of legal expenses incurred to effect a cessation of the union's illegal activities. ____ 24

A. The ruling of the NLRB in *Tidee Products* does not preclude an award of legal expenses as compensatory damages under Section 303. 24

B. This Court's decision in *Alyeska* does not preclude an award of legal expenses as compensatory damages under Section 303. ____ 27

C. The "American Rule" does not prohibit compensation for attorneys' fees incurred when they are assessed in a Section 303 action as damages sustained under the circumstances of this case. ____ 30

Conclusion ____ 32

TABLE OF AUTHORITIES

CASES:

Alyeska Pipeline Service Company v. The Wilderness Society, 421 U. S. 240 (1975) ____ 11, 27, 28, 29, 30, 31

Associated General Contractors of Minnesota v. Construction and General Laborers Local No. 563, 612 F. 2d 1060 (8th Cir. 1979) ____ 12, 14, 17, 22, 28, 29

TABLE OF AUTHORITIES—Continued

Pages

Bertero v. National General Corporation, 529 P. 2d 608, 620 (Cal. 1975), *en banc* 18

Blair v. United Mine Workers of America, 211 F. Supp. 786, 791 (E. D. Ky. 1962) 17

Bryant Air Conditioning & Heating Company, Inc. v. Sheet Metal Workers International Association, Local No. 541, 472 F. 2d 969 (8th Cir. 1973) 14

Cappaletti Brothers v. Local 487, 514 F. 2d 1239 (5th Cir. 1975) 14

Carpenters, Local 112 (Summit Valley Industries), 202 NLRB No. 153, 83 LRRM 1013 (1973) 7

Carpenters, Local 112 (Summit Valley Industries), 217 NLRB No. 129, 89 LRRM 1799 (1975) 5, 7

DeArroyo v. DeTrabajadores Packing House, AFL-CIO, 425 F. 2d 281 (1st Cir. 1970) 8

Eazor Express, Inc. v. International Brotherhood of Teamsters, etc., 520 F. 2d 951, 972 (3rd Cir. 1975), cert. den. 424 U. S. 935 13

F. F. Instrument Corp. v. Union de Tronquistas de Puerto Rico, 558 F. 2d 607 (1st Cir. 1977) 13, 14, 16

Food Store Employees Union Local No. 347, etc. v. NLRB, 476 F. 2d 546 cert. granted 414 U. S. 1062 (1973) 26

Gulf Coast Building & Construction Trades Council v. F. R. Hoar & Sons, Inc., 370 F. 2d 746 (5th Cir. 1967) 13

TABLE OF AUTHORITIES—Continued

Pages

Hall v. Cole, 412 U. S. 1, 13-14 (1973) 21, 22

Henderson v. United Brotherhood of Carpenters and Joiners of America, Local 112, Civil Nos. 2235 and 2239, D. Mont. (Butte Division) 6

Linbeck Construction v. International Association of Bridge, etc., 547 F. 2d 948 (5th Cir. 1977), cert. den. 434 U. S. 955 14

Local 984 v. Humko Company, 287 F. 2d 231 (6th Cir. 1961), cert. denied 366 U. S. 962 14

Mason Rust v. Laborers, Local 42, 435 F. 2d 939 (8th Cir. 1970) 14, 17

Maxey v. Butchers Union Local No. 126, 627 F. 2d 912 (9th Cir. 1980) 14, 24, 27

Mead v. Retail Clerks International Association, 523 F. 2d 1371 (9th Cir. 1975) 9, 14, 24, 27, 28

Mills v. Electric Auto Light, 396 U. S. 375, 397 (1970) .. 22

NLRB v. Food Store Employees, 417 U. S. 1 (1974) 26

NLRB v. Gissel Packing Co., 345 U. S. 575, 612 (1969) 26

Noranda Aluminum, Inc. v. United Brotherhood of Carpenters and Joiners of America, AFL-CIO, 528 F. 2d at 1309 16

Refrigeration Contractors, Inc. v. Plumbers & Pipefitters, Local 221, 501 F. 2d 668 (5th Cir. 1974) 13, 15

TABLE OF AUTHORITIES—Continued

Pages

Robertson, H. L. & Associates, Inc. v. Plumbers, Local 519, 429 F. 2d 520 (5th Cir. 1970) 13

St. Paul Fire and Marine Ins. Co. v. Crossetti Bros., Inc., 475 P. 2d 69, 70-71 (Or. 1970) 18

Scott v. Local Union 377, 548 F. 2d 1244, 1246 (6th Cir. 1977) 19, 28, 29

Sheet Metal Workers International Association, Local Union No. 223, AFL-CIO v. Atlas Sheet Metal Company of Jacksonville, 384 F. 2d 101 (5th Cir. 1967) 13, 16, 17

Southern Arizona York Refrigeration Co. v. Bush Mfg. Co., 331 F. 2d 1, 6-7 (9th Cir. 1964) 18

Spancrete Northeast, Inc. v. International Ass'n. of Bridge, Structural and Ornamental Ironworkers, Local 40, 514 F. Supp. 326, 332-333 (N. D. N. Y. 1981) 14

Steelworkers v. Butler Mfg. Co., 439 F. 2d 1110 (8th Cir. 1971) 19

Summit Valley Industries, Inc. v. Local 112, United Brotherhood of Carpenters and Joiners of America, 475 F. Supp. 665 (D. Mont. 1979) 1, 9

Summit Valley Industries, Inc. v. Local 112, United Brotherhood of Carpenters and Joiners of America, Cause No. 79-4663 (9th Cir. 1981, unpublished opinion) 1

Teamsters Local 20 v. Morton, 377 U. S. 252 (1964) 16

TABLE OF AUTHORITIES—Continued

Pages

Texas Distributors v. Local Union, No. 100, etc., 598 F. 2d 393 (5th Cir. 1979) 14, 17

Textile Workers Union v. Lincoln Mills, 353 U. S. 448, 457 (1957) 23

Tidee Products, 194 NLRB 1234, 1236-37 (1972), mod. enf. 502 F. 2d 349 (D. C. Cir. 1974), cert. den. 417 U. S. 921 24

Union of Electrical Workers v. NLRB, 502 F. 2d 349, 352-355 (D. C. Cir. 1974) 26

United Brotherhood of Carpenters and Joiners of America, Local 112 v. NLRB, Nos. 75-2064 and 75-2166 (9th Cir. 1979) 1, 7, 8

United Brotherhood of Carpenters and Joiners of America v. NLRB, 574 F. 2d 457 (9th Cir. 1978) 7, 8

Vaughan v. Atkinson, 369 U. S. 527 (1962) 18

STATUTES:

28 U. S. C. § 1254(1) 2

29 U. S. C. § 158, Section 8(b) (4), Labor-Management Relations Act of 1947 ..... 2, 4, 15, 20, 25

29 U. S. C. § 185, § 301, Labor-Management Relations Act of 1947 ..... 18, 29, 30

29 U. S. C. § 187, Section 303, Labor-Management Relations Act of 1947 ..... Throughout

27-2-207, Montana Code Annotated (1978) 8

TABLE OF AUTHORITIES—Continued

Pages

TREATISES AND TEXTS:

21 A. L. R. 3d 1068 (1968) 18

47 U. M. K. C. L. Rev. 566 (1979) 31

Legislative History of the Labor Management Relations Act of 1947, NLRB (1948) 19, 20, 22, 25, 26

MISCELLANEOUS:

S. Rep. No. 105 on S. 1126, 80th Cong. 1st Sess. (1947) 19, 25

NO. 81-497

In The

Supreme Court of the United States

October Term, 1981

SUMMIT VALLEY INDUSTRIES, INC.,
a Montana corporation,

Petitioner,

vs.

LOCAL 112, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the Court of Appeals in *Summit Valley Industries, Inc. v. Local 112, United Brotherhood of Carpenters and Joiners of America,* Cause No. 79-4663 (9th Cir. 1981, unpublished opinion), appears in the Joint Appendix (hereafter "J. A.") at J. A. 3. The opinion of the United States District Court for the District of Montana, *Summit Valley Industries, Inc. v. Local 112, United Brotherhood of Carpenters and Joiners of America,* 475 F. Supp. 665 (D. Mont. 1979), appears at J. A. 5.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on June 5, 1981. On August 27, 1981, Mr. Justice Rehnquist extended the time within which to file a Petition for a Writ of Certiorari to and including September 14, 1981. A timely Petition was filed and this Court granted the Writ on November 30, 1981. The jurisdiction of this Court rests upon 28 U. S. C. § 1254(1).

STATUTES INVOLVED

(1) Section 303 of the Labor-Management Relations Act of 1947 (hereafter "the Act") (29 U. S. C. § 187), which provides:

> "(a) It shall be unlawful, for the purpose of this section only, in an industry or activity affecting commerce, for any labor organization to engage in any activity or conduct defined as an unfair labor practice in section 158(b) (4) of this title.
>
> "(b) Whoever shall be injured in his business or property by reason of any violation of subsection (a) of this section may sue therefor in any district court of the United States subject to the limitations and provisions of section 185 of this title without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit."

(2) Section 8(b) (4) of the Labor-Management Relations Act of 1947 (29 U. S. C. § 158(b) (4)), which provides:

> "(b) It shall be an unfair labor practice for a labor organization or its agents—
>
> "• • •

"(4) (i) to engage in, or induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle, or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

"• • •.

" (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: Provided, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

"• • •.

" (D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work.

. . .

"• • •."

(3) Section 10 of the Labor-Management Relations Act of 1947 (29 U. S. C. § 160), which is reproduced in J. A. App. N 196.

STATEMENT OF THE CASE

The jurisdiction of the trial court below was invoked pursuant to Section 303 of the Labor-Management Relations Act of 1947, 29 U. S. C. § 187 (hereafter "the Act"), when Petitioner filed suit against the Respondent[1] to recover damages sustained as a result of the Respondent's adjudicated violations of Sections 8(b)(4)(B) and 8(b)(4)(D) of the Act [29 U. S. C. Section 8(b)(4)(B), (D)].

The Petitioner, Summit Valley Industries, Inc. ("Summit Valley"), was subjected to picketing and boycott activity by the Respondent, Carpenters Union, Local 112 ("Union"), shortly after it opened its modular home plant in Butte, Montana, in June of 1972. Beginning in mid-June, 1972, and continuing through November of that year, the Respondent Union engaged in a series of illegal acts intended to prevent Summit Valley's introduction of modular, pre-built factory homes to the Southwestern Montana area (J. A. App. L 82; App. M 179).

Summit Valley manufactures modular homes at its plant and sells the finished product to home buyers. The buyers in turn must contract independently with contractors for the construction of the necessary foundations upon which the modular home is to be installed at the jobsite. The purchaser also may, and often does, arrange to have ancillary structures (garages, steps, porches, etc) built and attached to the factory-built home (J. A. 91-93).

The Union began a campaign of preventing contractors from working on any factory-built modular homes in the Butte, Montana, area, by ordering all of its mem-

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1 Petitioner and Respondent are the sole parties to this proceeding.

bers, and self-employed contractors who were members of the Union, to cease working on homes manufactured by Summit Valley and other manufacturers.[2] The Union enforced this order by imposing substantial fines upon self-employed contractors, or their employees, who worked on Summit Valley's homes (J. A. 172; 106-108).

Faced with the inability of local contractors to complete necessary on-site work, several of Summit Valley's customers requested that Summit Valley complete the work (J. A. 113), which it did by assigning its own employees to finish the necessary on-site work.[3] Shortly thereafter the Union began picketing Summit Valley's plant.[4] The picketing began in mid-October, 1972, and continued until November 7, 1972, when it was terminated by an injunction issued by a United States District Court (J. A. 76).

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2 In addition to the illegal activities directed at Summit Valley, the Union also engaged in similar activity at the sites of modular homes constructed by the Boise Cascade Corporation (J. A. 109-112). This activity subsequently became the subject of unfair labor practice charges that were consolidated by the National Labor Relations Board for hearing along with Summit Valley's charges (J. A. 82).

3 Summit Valley's employees were, and are, represented by another union, Butte Teamsters Union, Local No. 2, under a collective bargaining agreement entered into with that Union shortly after Summit Valley began its operations (J. A. 105). The Teamsters represent a bargaining unit described as "[a]ll production workers, fabricators, erectors, assembly line workers, maintenance workers, cleanup workers and drivers" employed by Summit Valley (J. A. 105).

4 The picket sign read: "NOTICE TO PUBLIC, This Employer *did not* employ members of Carpenters Union in the work performed on this building—Local 112, Carpenters Union AFL-CIO." ("This building" referring to a model prefabricated home situated on Summit Valley's plant premises near its entrance where the picketing occurred.) (J. A. 75; 113).

Shortly after the picketing began, Summit Valley hired attorneys to take appropriate legal action to obtain a cessation of the picketing, and to obtain appropriate administrative and judicial prohibitions against the Union from coercing its members to cease performing the essential on-site work for Summit Valley's customers (J. A. 43). Consequently, there ensued six years of protracted, but successful, litigation which concluded with a permanent and judicially enforced cease-and-desist order against all of the Union's conduct. That litigation included the following proceedings:

1. On October 12, 1972, Summit Valley's attorneys filed unfair labor practice charges with the National Labor Relations Board, alleging violations of Sections 8(b)(4)(B) [Secondary Boycott] and 8(b)(4)(D) [Jurisdictional Dispute] of the Labor-Management Relations Act. [Case Nos. 19-CC-588 and 19-CD-212].

2. As a result of the filing of the unfair labor practice charges, injunction proceedings were instituted by the Regional Director of the National Labor Relatoins Board to obtain a Temporary Restraining Order under Section 10(1) of the Act in United States District Court, which proceedings resulted in a Temporary Restraining Order being issued by the United States District Court on November 8, 1972, restraining the Union from its conduct during the pendency of the NLRB litigation. [*Henderson v. United Brotherhood of Carpenters and Joiners of America, Local 112,* Civil Nos. 2235 and 2239, U.S.D.C., Mont.-Butte Div.].

3. A 10(k) proceeding was held before the National Labor Relations Board, pertaining to the jurisdictional dispute [Section 8(b)(4)(D)] aspect of the case. A two-

day hearing was held before a hearing officer of the National Labor Relations Board (November 28-29, 1972) and subsequently resulted in a decision favorable to Summit Valley by the National Labor Relations Board, issued on April 6, 1973. [*Carpenters, Local 112 (Summit Valley Industries)*, 202 NLRB No. 153, 83 LRRM 1013 (1973); J. A. App. L 73].[5]

4. A lengthy hearing, before an Administrative Law Judge, was held on 15 hearing dates occurring between June 5, 1973, and October 26, 1973, resulting in a 49-page decision issued on May 9, 1974, holding that the Union had violated Sections 8(b)(4)(B) and 8(b)(4)(D) of the Act. [J. A. App. M 82].

5. Proceedings were had before the National Labor Relations Board, Washington, D. C., which on May 12, 1975, upheld the decision of the Administrative Law Judge. [*Carpenters, Local 112 (Summit Valley Industries)*, 217 NLRB No. 129, 89 LRRM 1799 (1975)].

6. An appeal of the decision of the National Labor Relations Board was taken by the Union to the Ninth Circuit Court of Appeals, which Court on March 8, 1978, upheld the decision of the National Labor Relations Board and granted the petitions of the National Labor Relations Board for enforcement of its orders against the Union. [*United Brotherhood of Carpenters and Joiners, Local 112 v. NLRB*, 574 F. 2d 457 (9th Cir. 1978); J. A. App. M 179].

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5 Following this decision the Union was required by the Regional Director to file a statement that it would comply with the Board's decision and order in the proceeding. The Union, however, "threatened to continue picketing the site to enforce the claim rejected in the Section 10(k) award." *United Brotherhood of Carpenters and Joiners of America v. NLRB*, 574 F. 2d 457, at 463 (9th Cir. 1978) (J. A. 188-189; 194).

7. Contempt proceedings were initiated before the Ninth Circuit Court of Appeals to adjudicate the failure of the Union to comply with all of the provisions of the Board's order. These proceedings were discontinued by order of the Court on June 18, 1979, upon compliance by the Union with all of the provisions of the Board's order. [*United Brotherhood of Carpenters and Joiners of America v. NLRB*, Nos. 75-2064 and 75-2166 (9th Cir. 1979)].

This action to recover damages under Section 303 of the Act was commenced on September 25, 1974, while the proceedings before the NLRB were still pending.[6] The action was held in abeyance by order of the District Court until the orders of the NLRB became final or were vacated (J. A. 26). On July 19, 1978, following the Ninth Circuit's affirmance and enforcement of the NLRB decisions,[7] the District Court collaterally estopped the Union from further adjudicating the issue of liability under Section 303 (J. A. 28), and granted summary judgment on liability issues in favor of Summit Valley (J. A. 30).

On August 6, 1979, the issue of damages in this case was tried in the District Court. At the beginning of the trial the Union stipulated to the reasonable value of the attorneys' fees incurred in the injunctive and NLRB-

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6 J. A. 15. It was necessary to file the Section 303 action at that time to avoid the running of the statute of limitations for commencing such an action. The limitations period for such an action is governed by the applicable state statute regarding tort actions for property damage, which is two years in Montana. See *DeArroyo v. DeTrabajadores Packing House, AFL-CIO*, 425 F. 2d 281 (1st Cir. 1970); Montana Code Annotated, § 27-2-207 (1978).

7 *United Brotherhood of Carpenters and Joiners of America v. NLRB*, 574 F. 2d 457 (9th Cir. 1978).

related proceedings (J. A. 35), which Summit Valley claimed as its primary item of damages incurred.

The District Court found that it was "necessary to the survival" of Summit Valley "as a business to prevent the Defendant, Local 112, United Brotherhood of Carpenters and Joiners of America" from violating the secondary boycott and jurisdictional dispute sections of the Act.[8] The District Court also found that by reason of "continued threats on the part of the Union, it was necessary to employ attorneys from the time of the commencement of the picketing" until conclusion of the entire litigation, which resulted in Summit Valley incurring legal fees and related costs in the amount of $13,604.33 "to stop the Union's violations of the Act" (J. A. 7; Pl. Ex. 7 at J. A. 71).

The District Court held, however, that Summit Valley was not entitled to recover damages for attorney fees under Section 303 of the Act incurred in effecting a cessation of the Union's illegal activities because of the Ninth Circuit's ruling in *Mead v. Retail Clerks Local 839*, 523 F. 2d 1371 (9th Cir. 1975), by which the District Court concluded that "regardless of my own opinion, I am bound" (J. A. 7).

Summit Valley appealed the District Court's decision denying attorney fees to the Ninth Circuit Court of Appeals.[9] That Court, in a cursory and unpublished opinion,

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8 *Summit Valley Industries, Inc. v. Local 112, United Brotherhood of Carpenters and Joiners of America*, 475 F. Supp. 665 (D. Mont. 1979) (J. A. 6).

9 The District Court did award Summit Valley the sum of $1,176.00 for the time lost by its plant manager in the litigation (J. A. 10). The Union filed a cross-appeal from that award, but the Ninth Circuit affirmed the award of those damages (J. A. 5).

recognized and conceded "that other circuits hold a different view," but refused to reverse the District Court's denial of attorney fees incurred in Summit Valley's efforts before the NLRB to halt the illegal activities (J. A. 3). From that decision, Summit Valley Industries petitioned this Court for a writ of certiorari to issue to the United States Court of Appeals for the Ninth Circuit in cause numbered 79-4663. On November 30, 1981, this Court granted the Petition for Certiorari to review the question presented.

SUMMARY OF ARGUMENT

Summit Valley seeks recovery of legal fees and related expenses as compensatory damages under Section 303 of the Act which, the District Court found, were incurred in NLRB and corollary court proceedings to end illegal union activities directed against it and to preserve itself as an enterprise. Under the rule prevailing in the United States those legal expenses are recoverable because they are damages necessarily incurred in mitigation of the harm which would otherwise be caused. Aimed at preserving the enterprise in the face of illegal conduct potentially destructive of the business, such expenses are directly related to the illegal conduct and are clearly foreseeable injuries stemming from it. They are truly compensatory damages and as such are recoverable under Section 303.

A rule denying recovery of legal expenses frustrates the congressional policy expressed in Section 303 because

it denies the complete remedy Congress intended and has the effect of deterring the victims of illegal jurisdictional and secondary activity from seeking vindication of their federally protected rights.

The Ninth Circuit rule, upon which Summit Valley was denied the damages it seeks here, is erroneous because it requires deference to damage determinations made by the NLRB, but which it is not empowered to make. The Ninth Circuit's rule fails to recognize that the legal expenses sought here are legitimate compensatory damages falling outside the prohibitions on recovery of fees defined by this Court's decision in *Alyeska* and the so-called "American rule." The Ninth Circuit's rule also fails to recognize that the attorneys' fees sought in the instant case are *not* an "award" of attorneys' fees to the prevailing litigant, but are that part of Petitioner's damages consisting of attorneys' fees incurred in other proceedings in order to achieve resumption of the *status quo*.

———o———

ARGUMENT

I. The Prevailing Rule Allowing Recovery of Legal Expenses Incurred to Successfully Effect a Cessation of Illegal Activities, as Compensatory Damages Under Section 303, Should Be Adopted as the Established Rule.

A. The Majority of Decisions Allows Recovery of Legal Expenses Incurred to Effect a Cessation of Illegal Activity as Compensatory Damages Under Section 303.

Section 303 of the Act provides that "[w]ho ever shall be injured in his business or property [by reason of any violation of the secondary boycott provision of Section 8 (b) (4)], . . . shall recover the damages by him sustained and the cost of suit." 29 U. S. C. § 187 (b). The decision of the Eighth Circuit in *Associated General Contractors v. Construction and General Laborers, Local 563,* 612 F. 2d 1060, 1063-1064 (8th Cir. 1979), expresses with clarity the reasons why attorneys' fees and related litigation expenses, incurred in other proceedings to successfully obtain a cessation of the illegal activity and a resumption of the *status quo,* are includable as compensatory damages under Section 303:

> "The attorneys' fee demand here is predicated on the recovery of compensatory damages from an earlier, terminated violation, as provided by Section 303(b), not on a theory of recovery for attorneys' fees incurred in a suit brought as a 'private attorney general' or otherwise. . . . What is sought here is *not* an 'award' of attorneys' fees *in the case at hand,* but that part of [plaintiff's] compensatory damages consisting of the attorneys' fees it incurred in achieving resumption of work. [Citation omitted].

"Reasonable attorneys' fees incurred in effecting resumption of work in effect take the place of other compensable damages which would continue to be suffered if work were not resumed. Aimed at mitigating the losses resulting from a work stoppage, and at preserving the enterprise, they are analogous to costs of subcontracting and overtime. They are within the purview of Section 303(b) as other courts have held." (Emphasis supplied.)

Six Circuit Courts of Appeal have considered the question presented by this case. Five have held that legal expenses incurred to effect a cessation of illegal activities and preserve the enterprise are recoverable as compensatory damages under Section 303. The First,[10] Third,[11] Fifth,[12] Sixth[13] and Eighth[14] are in the majority. The

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10 *F. F. Instrument Corp. v. Union de Tronquistas de Puerto Rico*, 558 F. 2d 607 (1st Cir. 1977). The First Circuit held that attorneys' fees in that case were not recoverable under Section 303 because the unfair labor practice proceedings had been commenced after the union had ceased the illegal picketing. However, the First Circuit indicated that under different circumstances it might allow recovery of attorneys' fees incurred in preceding NLRB litigation if they were "closely related to the illegality" and could be shown to have been incurred "directly in mitigation of harm," thereby making them a "component of the damages flowing from the prior wrong." 558 F. 2d at 611; see discussion, infra, at pages 14-15.

11 *Eazor Express, Inc. v. International Brotherhood of Teamsters, etc.*, 520 F. 2d 951, 972 (3rd Cir. 1975), cert. den. 424 U. S. 935.

12 *Sheet Metal Workers International Association, Local Union No. 223, AFL-CIO v. Atlas Sheet Metal Company of Jacksonville*, 384 F. 2d 101 (5th Cir. 1967); *Refrigeration Contractors, Inc. v. Plumbers & Pipefitters, Local 211*, 501 F. 2d 668 (5th Cir. 1974); *H. L. Robertson & Associates, Inc. v. Plumbers, Local 519*, 429 F. 2d 520 (5th Cir. 1970); *Gulf Coast Building*

(Continued on the next page)

Ninth Circuit alone holds that attorney fees and related expenses of litigation are not recoverable under the statute regardless of how they were incurred.[15]

The First Circuit, although it rejects recovery of legal expenses incurred *after* the illegal activity has ended as being "too remote" to be regarded as compensatory damages, recognizes that legal expenses are recoverable under Section 303 where "incurred in removing an illegal picket line or otherwise directly in mitigation of harm" because the expenses in that situation are "closely related to the illegality." *F. F. Instrument Corp. v. Union de Tronquistas*, 559 F. 2d 607 (1st Cir. 1977). Thus, under the First Circuit's approach, once the "Board proceeding is aimed chiefly at securing redress and future protection," legal expenses incurred in that proceeding are not recoverable. The First Circuit, then, attempts to harmonize the two approaches to the question of recovering legal expenses as damages under Section 303. See *Spancrete*

(Continued from the previous page)

& Construction Trades Council v. F. R. Hoar & Son, Inc., 370 F. 2d 746 (5th Cir. 1967); *Linbeck Construction v. International Association of Bridge, etc.*, 547 F. 2d 948 (5th Cir. 1977), cert. den. 434 U. S. 955; *Texas Distributors v. Local Union, No. 100, etc.*, 598 F. 2d 393 (5th Cir. 1979); *Capeletti Brothers, Inc. v. Local 487*, 514 F. 2d 1239 (5th Cir. 1975).

13 *Local 984 v. Humko Company*, 287 F. 2d 231 (6th Cir. 1961), cert. denied 366 U. S. 962.

14 *Associated General Contractors of Minnesota v. Construction and General Laborers Local No. 563*, 612 F. 2d 1060 (8th Cir. 1979); *Mason-Rust v. Laborers, Local 42*, 435 F. 2d 939 (8th Cir. 1970); *Bryant Air Conditioning & Heating Company, Inc. v. Sheet Metal Workers International Association, Local No. 541*, 472 F. 2d 969 (8th Cir. 1973).

15 *Mead v. Retail Clerks International Association*, 523 F. 2d 1371 (9th Cir. 1975); *Maxey v. Butchers' Union Local No. 126*, 627 F. 2d 912 (9th Cir. 1980).

Northeast, Inc. v. International Ass'n. of Bridge Structural and Ornamental Ironworkers, Local 40, 514 F. Supp. 326, 332-333 (N. D. N. Y. 1981).

The legal expenses sought by Summit Valley fall precisely within the boundaries of the prevailing rule and would be recoverable under it. It seeks to recover legal expenses as an element of compensatory damages under Section 303 which were incurred to effect a cessation of the Union's illegal secondary boycott and jurisdictional activities.[16] The trial court found that "[i]t was necessary to the survival of Summit Valley as a business" to obtain a cessation of the illegal activities; and that "by reason of continued threats on the part of the Union, it was necessary to employ attorneys from the time of the commencement of the picketing" until the conclusion of the litigation (J. A. 6). Summit Valley is *not* seeking attorneys' fees incurred to prosecute the Section 303 action itself, and the courts have uniformly held that such legal expenses are not recoverable. E. g., *Refrigeration Contractors, Inc. v. Local Union, No. 211,* 501 F. 2d 668 (5th Cir. 1974). Summit Valley seeks simply to be compensated for damages, in the form of legal expenses necessarily incurred when it successfully sought and obtained remedies from the NLRB and the courts to protect itself from Respondent's illegal activity, thereby allowing its business to resume and continue as it had before the illegal action took place.

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16 See 29 U. S. C. Section 8(b)(4)(B), (D); 29 U. S. C. Section 187(a).

B. The Prevailing Rule, Allowing Recovery of Preemptive Legal Expenses As Compensatory Damages, Is Consistent With Both the Statute and Congressional Policy.

1. Section 303 contemplates recovery of all actual compensatory damages.

In *Teamsters Local 20 v. Morton*, 377 U. S. 252, 260 (1964), this Court held that damages recoverable under Section 303 include all "actual, compensatory damages." That holding was based on the language of the statute itself, *id.*, at 260, n. 15, together with a reference to its legislative history. *Id.* n. 16 (citing 93 Cong. Rec. 4858). The Courts of Appeal have consistently applied the rule in *Morton*. E. g., *Noranda Aluminum, Inc. v. United Brotherhood of Carpenters and Joiners, etc.*, 528 F. 2d 1304 (8th Cir. 1976).

2. Legal expenses incurred to effect a cessation of illegal activities and allow a resumption of work are compensatory damages within the contemplation of Section 303.

Summit Valley incurred more than $13,000 in attorneys' fees and related expenses to obtain and maintain a cessation of the Union's illegal secondary and jurisdictional acts (J. A. 7; Pl. Ex. 7 at J. A. 71). Failure to incur those legal expenses would have resulted in its demise (J. A. 6). The legal expenses sought here were *directly caused* by the illegal activity. When a secondary boycott occurs, as it did in this case, reasonable legal action and consequent legal expenses to stop the activity and compel resumption of the *status quo* are obviously foreseeable consequences of engaging in such activity. The legal expenses sought here by Summit Valley, therefore, fit squarely within traditional legal concepts of compensatory damages. *F. F. Instrument*, 558 F. 2d at 611; *Atlas Sheet*

Metal Co., 384 F. 2d at 109-110; *Associated General Contractors*, 612 F. 2d at 1063.

Attorneys' fees and related costs expended to terminate the illegal activity—and thus also terminating accruing damages—are closely analogous to other elements of compensatory damages which are routinely awarded under Section 303. *Associated General Contractors*, 612 F. 2d at 1063; *Texas Distributors*, 598 F. 2d at 1380-81. Subcontracting costs, for example, brought about because the employer victimized by an illegal work stoppage is trying to avoid additional damages for contract penalties are a commonly recognized element of damages under Section 303. E. g., *Atlas Sheet Metal Co.*, 385 F. 2d at 109-110. Likewise, the additional costs of overtime pay resulting from efforts to "catch up on work delayed" by the illegal conduct are recoverable. *Id.*, at 109; *Mason-Rust*, 439 F. 2d at 947-948. The cost of security guards employed to protect a struck business from acts of vandalism or violence are also awarded under Section 303. E. g., *Blair v. United Mine Workers of America*, 211 F. Supp. 786, 791 (E. D. Ky. 1962).[17]

These types of employer expenditures for which damages are consistently awarded under Section 303 are aimed at preserving the enterprise and ultimately mitigating the harm caused.[18] The expenditure of monies for attorneys'

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17 It would be anomalous to allow recovery for the cost of security guards needed to protect the business during the illegal activity, but deny indemnification for the legal costs incurred to terminate the illegal conduct itself, simply because the latter costs are comprised of "attorneys' fees."

18 An employer claiming damages under Section 303 is obligated to mitigate his damages. *Vulcan Materials Co. v. United Steelworks of America*, 430 F. 2d 446, 458 (5th Cir. 1970) cert. den. 401 U. S. 461.

efforts which result in the termination of the illegal conduct and preservation of the business preempts the occurrence of both additional accruing damages and the illegal conduct. Such preemptive expenses should not be given different treatment as damages under Section 303 simply because their principal component is attorneys' fees.

The concept that attorney fees and related costs of litigation can constitute an element of compensatory damages is a familiar legal principle. This Court has recognized the concept. See *Vaughan v. Atkinson*, 369 U. S. 527, 530-531 (1962). The law of indemnity has long recognized attorneys' fees to be an element of compensatory damages in those kinds of cases. E. g., *Southern Arizona York Refrigeration Co. v. Bush Mfg. Co.*, 331 F. 2d 1, 6 (9th Cir. 1964); see, e. g., *St. Paul Fire and Marine Ins. Co. v. Crossetti Bros., Inc.*, 475 P. 2d 69, 72 (Or. 1970). In malicious prosecution and false arrest actions, attorneys' fees are recoverable as compensatory damages where they were incurred to defend against the malicious claim or the false arrest, while those incurred in prosecuting the action itself are not recoverable. E. g., *Bertero v. National General Corporation*, 529 P. 2d 608, 620 (Cal. 1975), *en banc*; see, generally, *Annot.*, 21 A. L. R. 3d 1068 (1968).

In federal labor law, it has also been recognized in decisions under Section 301 of the Act[19] that attorney fees can constitute an element of compensatory damages in cases brought by union members in suits for breach of a union's duty of fair representation. It has been held that since a principal element of the plaintiff's damages in such cases is the amount which it cost him in attorneys' fees

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19 29 U. S. C. § 185.

and other expenses to do that which the union was obliged but failed to do on his behalf, such plaintiffs are entitled to be awarded, as damages, attorneys' fees and other costs expended in prosecuting a successful claim against the employer, "costs which he would not have incurred but for the union's breach of its duty to represent him fairly and in good faith." *Scott v. Local Union 377,* 548 F. 2d 1244, 1246 (6th Cir. 1977); *Steelworkers v. Butler Manufacturing Company,* 439 F. 2d 1110, 1112 (8th Cir. 1971).

3. The majority rule vindicates congressional policy expressed by Section 303.

It was a common observation by the congressmen who debated and enacted the Labor Management Relations Act of 1947 that the secondary boycott (Section 8(b) (4) (B)) and the jurisdictional strike (Section 8(b) (4) (D)), particularly as they affected the small business or firm, were labor abuses which had to be prohibited by the legislation. Senator Taft, for example, wrote in Senate Report No. 105 on S. 1126, which accompanied the first reading of the Act in the Senate, that

> "[t]here appears to be virtually no disagreement as to the complete injustice of secondary boycotts and jurisdictional strikes or as to the necessity of giving injured third parties a remedy against their operation. For the most part, it is the small employer, often with less than 50 employees, and the farmer or farm trucker who are the main victims of this type of . . . union activity."
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> 1 *Legislative History of the Labor Management Relations Act of 1947,* NLRB, at 460 (1948) [hereafter *"Legislative History"*].

Senator Ball of Minnesota called the secondary boycott "one of the most vicious abuses of economic power now being indulged in by labor unions." *Id.*, Vol. 2 at 1351. Against this backdrop, Section 303 was enacted for the specific purpose of providing a damage remedy—apart from the normal administrative powers of the NLRB under Section 10—for the victims of secondary boycotts and jurisdictional strikes. See Senate Report No. 105 on S. 1126, 80th Cong. 1st Sess. (1947), 1 *Legislative History* at 460-461.[20]

Thus, Section 303 is the only provision in the Act creating a money damage remedy in addition to the remedial authority of the NLRB, and it applies only to the unfair labor practices set out in Section 8(b)(4) of the Act (29 U. S. C. Section 158(b)(4)). No other unfair labor practice, either by an employer or a union, is given a concomitant damage action as an additional remedy.

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20 Senator Taft made the following observation when he presented his proposed Section 303 to the Senate:

> "I think it is a most effective remedy. Under the bill there is a kind of injunctive remedy through the National Labor Relations Board, but there is no possibility of a suit for damages. I have heretofore cited the typical case of a secondary boycott, wherein the small businessman is practically put out of business because he is required to recognize, we will say, an AFL union, and a CIO union will not handle his goods. There are number of cases of that kind in the record. Further, I think the threat of a suit for damages is a tremendous deterrent to the institution of secondary boycotts and jurisdiction strikes."
>
> 2 *Legislative History* at 1371.

Taft later stated that if a "remedy is to be provided at all, if there is to be any recourse for financial losses caused by unions, it must be by direct suit, as proposed by the amendment [Section 303]." *Id.*

See 29 U.S.C. Section 187(a); *compare* 29 U.S.C. Sections 158 (a) and (b).

Yet under the rule followed by the Ninth Circuit the small employer like Summit Valley continues to be denied a complete remedy and full compensation for the "damages sustained by him" because of illegal union secondary and jurisdictional activity. For Summit Valley the largest element of damages—legal expenses incurred to end the illegal activity—have not been recovered. The Congressional policy to provide an effective damage remedy has thus been frustrated because the Petitioner, who chose to extricate himself from the peril caused by the Union's activity, has been forced to assume substantial costs, in the form of legal expenses, simply to protect its right to do business.

If counsel fees incurred to end illegal activity and allow work to resume are not compensable under Section 303, illegal union activities directed against the small business will often continue because other compensatory damages which are allowed are not, in many cases, sufficient in amount to justify the expense of litigation. See *Hall v. Cole,* 412 U.S. 1, 13-14 (1973). Because of the inherent difficulty in proving other monetary losses caused by an illegal boycott activity (e.g., as in this case, the loss of customers who were persuaded by illegal picketing from purchasing the employer's boycotted products), and because unions in the Ninth Circuit need not fear indemnifying the employer for his legal expenses in resisting the activity, such unions are effectively motivated to engage in illegal self-help activity in the hope that the employer may forsake federally protected rights as a pragmatic exchange for avoiding expenditure of non-reimbursable

legal expenses.[21] Acquiescence to illegal demands, rather than the vindication of federally protected rights and deterrence of illegal acts, directly contravenes the results which Congress intended. 2 *Legislative History* at 1371.

Because they mitigate the losses resulting from a work stoppage, attorneys' fees incurred to procure a resumption of the enterprise inure to the benefit of the union as well as the injured employer. *Associated General Contractors*, 612 F. 2d at 1064. Therefore, the decisions of the majority of the circuits not only provide a meaningful underpinning to support the basic policy purposes of Section 303, but also grant protection to the union and its membership by saving them from the exposure to far greater financial liability to which they would be subjected if illegal secondary boycott activities were allowed to continue and thereby cause greater injury. See *Hall*, 412 U. S. at 5-7; *Mills v. Electric Auto-Lite*, 396 U. S. 375, 396 (1970).

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21 The motivation for a union to continue its illegal conduct, even after the illegality is adjudicated at initial stages of the proceedings, is exemplified in this case. The Ninth Circuit expressly noted in the enforcement proceedings that the Respondent Union threatened to continue picketing even after the NLRB had made its initial determination against the Union in the Section 10(k) (jurisdictional dispute) proceedings:

> "To resolve this conflict, the Board entered a Section 10 (k) award giving the work to the Teamsters. *But after the award, the union threatened to continue picketing the site to enforce the claim rejected in the Section 10(k) award.* In its initial acts against Summit and its *further threats* against the manufacturers, the union clearly violated Section 8(b)(4)(D) as found by the Board."
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> 574 F. 2d 457 at 463; J. A. 194; emphasis in original.

The language of Section 303 itself, together with its legislative history, supports the conclusion that the prevailing rule allowing recovery of preemptive legal expenses is in accord with the congressional policy expressed in Section 303. Congress plainly intended Section 303 to be fully remedial and to restore to the victimized employer all of his losses caused by the illegal activity. Applying the prevailing rule and awarding preemptive legal expenses as damages under Section 303 would be in accord with this Court's definition of the role of federal courts in fashioning remedies under the Act to effectuate its purposes:

> "The Labor-Management Relations Act expressly furnishes some substantive law. It points out what the parties may or may not do in certain situations. Other problems will lie in the penumbra of express statutory mandates. Some will lack express statutory sanction but will be solved by looking at the policy of the legislation and fashioning a remedy that will effectuate that policy. The range of judicial inventiveness will be determined by the nature of the problem."
>
> *Textile Workers Union v. Lincoln Mills*, 353 U. S. 448, 457 (1957).

The rule prevailing in the Ninth Circuit frustrates the Congressional policy and this Court's interpretation of the role of the federal courts in effectuating that policy. Because the Ninth Circuit's rule fails to recognize that legal expenses incurred to end the illegal activity and protect the business can, and do, constitute a portion of the compensatory damages recoverable under Section 303, the Ninth Circuit has therefore improperly restricted the full remedial force intended by Section 303 to compensate the victims of illegal boycott activity. The Ninth Circuit thus abdicates the duty of the federal courts to fashion remedies that effectuate that policy.

II. The Ninth Circuit Erred in Denying Recovery of Legal Expenses Incurred to Effect a Cessation of the Union's Illegal Activities.

A. The Ruling of the NLRB in Tidee Products Does Not Preclude an Award of Legal Expenses as Compensatory Damages Under Section 303.

In denying Summit Valley's claim for damages stemming from expenditures for preemptive legal expenses, the Ninth Circuit relied upon two of its previous decisions: *Mead v. Retail Clerks International Association*, 523 F. 2d 1371 (9th Cir. 1975); and *Maxey v. Butchers' Union Local No. 126*, 627 F. 2d 912 (9th Cir. 1980). In both cases, the Ninth Circuit concluded that to allow recovery of attorneys' fees incurred to effect a cessation of illegal activity as an element of damages under Section 303 would undermine the NLRB's rule[22] awarding attorneys' fees only in situations where the charged party's defense before the board is "frivolous or in bad faith." *Mead*, 523 F. 2d at 1381; *Maxey*, 627 F. 2d at 916. That rationale is seriously misplaced.

The Ninth Circuit's *Tidee Products* rationale implies that the NLRB is the primary judge of what damages are awardable under Section 303. That is obvious from the language in *Mead* wherein the court states that "[i]f attorneys' fees incurred in board proceedings could be recovered in every case by subsequent Section 303 action, it would circumvent the board's rule allowing recovery of such fees only where the defense is frivolous or in bad faith." *Mead*, 523 F. 2d at 1381.

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22 *Tidee Products*, 194 NLRB 1234, 1236-37 (1972), mod. enf. 502 F. 2d 349 (D. C. Cir. 1974), cert. den. 417 U. S. 921.

Section 303 itself, however, vests the power to award and fix damages for violations of Section 8(b)(4) of the Act exclusively in the federal courts. Had Congress intended that the NLRB determine what damages are recoverable under Section 303 it would never have needed to enact the provision. Senator Taft himself expressed that point more than once.[23]

Senator Morse of Oregon introduced a bill during the consideration of the Act which would have abolished Section 303 and given the NLRB exclusive authority for resolution of the unfair labor practice disputes which are the subject of Section 303—secondary boycotts and jurisdictional strikes. 2 *Legislative History* at 985-989. The Morse bill, however, was rejected by Congress, and Section 303 was ultimately enacted into law. 2 *Legislative History* at 1400.

Plainly, Congress enacted Section 303 to provide a special remedy for the victims of secondary boycotts and

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23 "We considered making it [a damage remedy] a procedure through the National Labor Relations Board also, but *it is not felt* I think by any of those on the other side of these questions *that the labor board is an effective tribunal for the purpose of trying to assess damages in such a case.* I do not think anyone felt that the particular function should be in the board. So if such a remedy is to provide it at all, if there is to be any recourse for financial losses caused by unions, it must be by direct suit as proposed by the amendment." 2 *Legislative History* at 1371; emphasis supplied.

"To a small storekeeper, or machine shop, picketed out of business by unions intervening between him and his employees, or to the farmer prevented from unloading his perishable produce, the remedy of dealing with the NLRB is a weak reed. * * *. The amendment [Section 303] proposes that he be entitled to file a suit for damages and obtain a temporary injunction while that suit is being heard." Senate Report No. 105 on S. 1126, 80th Congress, 1st Sess. (1947); 1 *Legislative History* at 460.

jurisdictional strikes by way of damage actions in the federal courts. The legislative history plainly indicates that Congress did not believe the NLRB was an appropriate tribunal to provide the damage remedy which Congress intended. 2 *Legislative History* at 1371-1400. Yet the rule prevailing in the Ninth Circuit requires the court to defer to NLRB determinations in Section 10 proceedings[24] in determining whether legal expenses can be awarded as damages under Section 303. Under such a rule the legitimate authority of the federal courts is being undermined. The NLRB simply has no power under Section 10, or any other statutory provision, to decide what damages are recoverable in a Section 303 court proceeding and it was never intended that it have that power.[25]

It is questionable, further, whether the NLRB even has authority to award monetary damages to a party before it in Section 10 proceedings other than in situations where the NLRB is expressly granted that power with respect to awards of backpay under Section 10(c) of the Act [29 U. S. C. Section 160(c)].[26] Certainly, the remarks of

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24 29 U. S. C. § 160.

25 The remedies provided through NLRB proceedings in Section 10 of the Act and the courts in Section 303 are completely independent. A Section 303 action is not a proceeding in which the Court is called upon to review an NLRB decision and is required to defer to its decisions and selection of remedies, unless they are arbitrary or based upon clearly erroneous findings of fact. See e. g., *NLRB v. Gissel Packing Co.*, 395 U. S. 575, 612 (1969).

26 See *Union of Electrical Workers v. NLRB*, 502 F. 2d 349, 352-355 (D. C. Cir. 1974), in which Judge Mackinnon examined that issue and concluded that the NLRB did not have authority to award monetary damages under its grant of power pursuant to Section 10 of the Act other than in back pay situations. Compare *Food Store Employees Union Local No. 347, etc. v. NLRB*, 476 F. 2d 546, cert. granted 414 U. S. 1062 (1973). This Court expressly did not decide the issue in *NLRB v. Food Store Employees*, 417 U. S. 1, 8, n. 9 (1974).

Senator Taft wherein he notes that the NLRB is not a tribunal equipped to "assess damages" and that there "was no possibility of suit for damages" without Section 303, suggests that Congress never intended the NLRB to have power to award monetary compensation under Section 10, much less to determine what damages are recoverable under Section 303. See notes 23 and 20, *supra*.

It is thus clear that Congress created two separate and independent remedies available to victims of secondary boycotts and jurisdictional strikes. One avenue contemplates litigation before the NLRB to obtain cease and desist orders, 29 U. S. C. Section 160 (c), with the other proceeding in federal court for the recovery of damages. 29 U. S. C. Section 187. The rationale of the Ninth Circuit, however, if taken to its conclusion, would remove from the federal courts their responsibility to fix damages under Section 303, because it would impermissibly delegate that function to the NLRB.

B. This Court's Decision in Alyeska Does Not Preclude an Award of Legal Expenses as Compensatory Damages Under Section 303.

In *Mead*, 523 F. 2d at 1380, and *Maxey*, 627 F. 2d at 916, the Ninth Circuit refused to allow the recovery of attorney's fees incurred to effect a cessation of illegal activities under Section 303 because such an award would be "inconsistent with the American rule which normally forbids attorney's awards." The union argued in the proceedings below that the "American rule," particularly as expressed in the decision of this Court in *Alyeska Pipelines Service v. Wilderness Society*, 421 U. S. 240 (1975), precludes an award of attorneys' fees under Section 303.

In *Alyeska*, this Court determined that the so-called "private attorney general" theory was not a permissible basis upon which a court could award attorneys' fees to a prevailing litigant, because such a determination required a decision as to whether the public policy allegedly vindicated by the private attorney general was of sufficient import to justify an award of fees. This Court concluded that such determinations must be left to Congress. *Id.*, at 263-264. *Alyeska* did not involve the situation where attorneys' fees and related legal expenses may be recoverable as an element of *compensatory* damages, and it did not consider the scope of Section 303.

The courts which have considered the relationship between *Alyeska* and the recoverability of attorneys' fees under Section 303 have concluded that *Alyeska* does not bar the award of fees which legitimately comprise an element of compensatory damages.[27] In *Associated General Contractors*, 612 F. 2d at 1063, the Eighth Circuit, in discussing the applicability of *Alyeska* to the issue raised here, observed that:

> "*Alyeska* did not involve labor law and did not discuss Section 303. The case involved only the propriety of

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27 Section 303 does not contain a provision expressly awarding attorney fees to a prevailing litigant. That omission, of course, means only that the court cannot make an award of attorneys' fees *for the prosecution of the Section 303 action itself.* That Congress did not provide for such an award does not imply or suggest that attorneys' fees which are an element of the "damages sustained" cannot be recovered. *Associated General Contractors*, 612 F. 2d at 1063; *Scott*, 548 F. 2d at 1246; see also *Mead*, 523 F. 2d at 1380. For the same reason, Taft's reference to the absence of a fee provision in the statute, to which reference is made in *Morton*, 377 U. S. at 260, n. 15, does not mean that preemptive legal expenses were not intended to be recoverable as part of the "actual losses" which Taft stated would be recoverable.

the 'private attorney general' exception there in issue. The attorneys' fee demand here is predicated on the recovery of *compensatory damages* from an earlier, terminated violation, as provided by Section 303(b), not on a theory of recovery of attorney's fees incurred in a suit brought as a private attorney general or otherwise. We cannot agree that *Alyeska,* a Supreme Court opinion in a case so different on its facts, can of itself warrant summary judgment and dismissal of a complaint seeking attorneys' fees under Section 303(b) as damages incurred in effecting resumption of work." (Emphasis supplied.)

The same distinction was also applied in *Scott v. Local Union 377,* 548 F. 2d at 1246, wherein the Sixth Circuit considered the question of whether *Alyeska* precluded an award of attorneys' fees as compensatory damages under Section 301 of the Act. The court noted that *Alyeska* "reaffirmed the traditional American rule that attorney fees are not ordinarily recoverable by the prevailing litigant in federal litigation in the absence of statutory authorization." It went on to note, however, the decision did not in any way affect "those cases in which the attorney fees are not an award of the successful litigant in the case at hand, but rather are the subject of the lawsuit itself." The court concluded that since the attorneys' fees sought in the case were actually an element of the compensatory damages, *Alyeska* constituted no bar to their recovery. On the other hand, the court noted the *Alyeska* decision does preclude the recovery of damages for the prosecution of the Section 301 action itself because the statute does not award attorneys' fees to the prevailing litigant.

In *Scott* and *Associated General Contractors,* the courts correctly recognized that *Alyeska* precludes the re-

covery of attorneys' fees under Sections 301 and 303 for the prosecution of those actions, but that at the same time *Alyeska* does not, in any way, preclude a litigant from recovering as an element of his compensatory damages attorneys' fees incurred in other proceedings and directly related to the illegality. Since Summit Valley is not claiming damages for the prosecution of the Section 303 action itself, *Alyeska* does not constitute a bar to the recovery of those damages to the extent they are comprised of attorneys' fees.

C. The "American Rule" Does Not Prohibit Compensation for Attorneys' Fees Incurred When They Are Assessed in a Section 303 Action as Damages Sustained Under the Circumstances of This Case.

The Ninth Circuit has improperly engaged in a semantical merger of two distinct concepts of legal expenses: Those legal expenses awarded to the prevailing litigant in prosecuting the primary action, on the one hand, and legal expenses incurred by a party in the context of another proceeding which had, as its primary purpose, not the adjudication of financial liability but the rectification of harm incurred and the mitigation of plaintiff's damages. The Ninth Circuit has thus failed to recognize that attorneys' fees sought in the Section 303 action are *not* "attorneys' fees" *qua* "attorneys' fees," but are simply a distinct item of damage that accrued in the form of legal expenses in order to rightfully restore the victim to the *status quo*.

The Ninth Circuit erroneously followed its apparent first blush impression that the so-called "American rule"

prohibited the assessment of attorneys' fees as damages.[28] The Ninth Circuit overlooks the fact that the award of attorneys' fees as damages in a Section 303 action arises by right of the statute itself, allowing reimbursement for all "actual, compensatory" damages. Furthermore, the American rule, because it is based upon the rationale that losing litigants were "unfairly saddled with exhorbitant fees for the victor's attorney," *Alyeska*, 421 U. S. at 252, is inapplicable because in the circumstances of this case it was in the employer's interest to effect a cessation of the unlawful activities, achieve immediate resumption of the enterprise, and mitigate all of its damages, whether they were occurring in the form of business damages caused by the interruptions or in the form of attorneys' fees.

The critical distinction ignored by the Ninth Circuit is that between litigation expenses awarded for a Section 303 action brought for the purpose of adjudicating the damage liability, and litigation expenses as damages for prior proceedings, incurred independently of and prior to the Section 303 action. As a majority of the Circuits in Section 303 cases have properly recognized, the American rule does not affect those cases in which the attorney's fees are *not* an "award" to the "prevailing" litigant in the primary damages suit but are, rather, inherently compensatory damages which are the direct and foreseeable results of the injured party's successful termination of the original illegal activity and consequent mitigation of damages.

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28 The "American rule" refers to the general practice in this country by which parties bear their own attorneys' fees. See Raack, "Theories of Recovering Attorneys' Fees: Exceptions to the American Rule," 47 U. M. K. C. L. Rev. 566 (1979).

CONCLUSION

The Judgment of the Court of Appeals for the Ninth Circuit entered in Cause No. 79-4663 should be reversed.

Respectfully submitted,

DONALD C. ROBINSON
Poore, Roth & Robinson, P.C.
1341 Harrison Avenue
Butte, Montana 59701-4898
Telephone: (406) 782-1223
Attorney for Petitioner

Of Counsel: DOUGLAS A. BUXBAUM
Poore, Roth & Robinson, P.C.
1341 Harrison Avenue
Butte, Montana 59701-4898
Telephone: (406) 782-1223

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Respondent's Brief

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No. 81-497

In The

Supreme Court of the United States

October Term, 1981

SUMMIT VALLEY INDUSTRIES, INC.,
a Montana corporation,

Petitioner,

vs.

LOCAL 112, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT

DAVID S. PAULL
PAUL T. BAILEY
BAILEY & PAULL

208 Bailey Building
5441 S. W. Macadam Avenue
Portland, Oregon 97201
Telephone: (503) 221-0077

Attorneys for Respondent

COCKLE PRINTING CO., 2311 Douglas St., Omaha 68102

QUESTION PRESENTED

Whether the Ninth Circuit Court of Appeals correctly ruled that an employer is not entitled to recover attorneys' fees incurred in proceedings before the National Labor Relations Board in a subsequent action for damages under Section 303 of the Labor Management Relations Act of 1947, as amended, 29 U. S. C. § 187.

TABLE OF CONTENTS

Pages

Question Presented i

Table of Authorities iii

Statement of the Case 1

Summary of Argument 5

Argument:

The Ninth Circuit Was Correct In Ruling That An Employer, In an Action Under Section 303, Is Not Entitled To Recover Attorneys' Fees Incurred In Prior Proceedings Before The National Labor Relations Board. 7

A. The Ninth Circuit Ruling is Consistent with the Applicable Statutes and Cases. 7

B. In the United States, Attorneys' Fees are Not Recoverable by a Prevailing Litigant Absent Statutory or Contractual Authorization. 8

C. In the Instant Case, No Statute or Contract Authorizes an Award of Attorneys' Fees. 10

D. Congressional Intent as Expressed in Section 10 (c) of the Act Precludes a Court Award of Attorneys' Fees. 17

E. A Sum Paid to an Attorney for the Purpose of Securing a Legal Determination, May Not Be Recovered Regardless of the Effect of the Attorneys' Efforts. 25

TABLE OF CONTENTS—Continued

Pages

F. Petitioner's Claim for Attorneys' Fees is Not Within the Boundaries of the Position Taken By the First, Third, Fifth, Sixth and Eighth Circuits. 28

Conclusion 29

TABLE OF AUTHORITIES

CASES:

Alyeska Pipeline Service Co. v. The Wilderness Society, 421 U. S. 240 (1975) 8, 9, 10, 26, 28

Arcambel v. Wiseman, 3 Dall. 306 (1796) 8, 9

Artvale, Inc. v. Rugby Fabrics Corp., 232 F. Supp. 814 (D. C. N. Y. 1964) 8

Associated General Contractors v. Construction and General Laborers, Local 563, 612 F. 2d 1060 (8th Cir. 1979) 25

Bertero v. National General Corporation, 529 P. 2d 608, 620 (Cal. 1975) 27

Bryant Air Conditioning & Heating Co., Inc. v. Sheet Metal Workers Local No. 541, 472 F. 2d 969 (8th Cir. 1973) 10, 23

Capeletti Brothers, Inc. v. Local 487, 514 F. 2d 1239 (5th Cir. 1975) 12, 13

Carpenters Local No. 978 v. Markwell, 305 F. 2d 38, 47 (8th Cir. 1962) 12

TABLE OF AUTHORITIES—Continued

Pages

Eazor Exp., Inc. v. International Bhd. of Teamsters, 520 F. 2d 951, 974 (3rd Cir. 1975) 12

F. D. Rich Co. v. United States ex rel. Industrial Lumber Company, 417 U. S. 116 (1974) 8

F. F. Instrument Corp. v. Union de Tronquistas de Puerto Rico, 558 F. 2d 607 (1st Cir. 1977) 25

Forsythe v. Starnes, 554 S. W. 2d 100 (Mo. App. 1977) 9

Guardian Trust Co. v. Kansas City Southern Ry., 28 F. 2d 233 (8th Cir. 1928) 9

Hall v. Cole, 412 U. S. 1 (1973) 8

International Ladies' Garment Workers Union, AFL, et al. v. Jay-Ann Co., Inc., 228 F. 2d 632 (5th Cir. 1956) 15

Local 984 v. Humko Co., 287 F. 2d 231 (6th Cir. 1961), cert. den. 366 U. S. 962 (1960) 13

Mason-Rust v. Laborers Local No. 42, 435 F. 2d 939 (8th Cir. 1970) 13

Maxey v. Butchers Union, Local No. 126, 627 F. 2d 912 (9th Cir. 1980) 8

Mead v. Retail Clerks International Association, 523 F. 2d 1371 (9th Cir. 1975) 7, 8, 13, 21, 23, 25

Mercury Oil Refining Co. v. Oil Workers Union, 187 F. 2d 980 (10th Cir. 1951) 15

NLRB v. Food Store Employees Union, Local 347, 417 U. S. 1 (1974) 18, 19, 21, 22, 24, 27

TABLE OF AUTHORITIES—Continued

Pages

Ritter v. Ritter, 381 Ill. 549, 46 N. E. 2d 41, 44 (1943) 14

St. Paul Fire & Marine Ins. Co. v. Crosetti Bros., Inc., 475 P. 2d 69, 72 (Or. 1970) 27

Sheet Metal Workers Local No. 223 v. Atlas Sheet Metal Co., 384 F. 2d 101 (5th Cir. 1967) 12

Sillman v. Teamsters Local 386, 535 F. 2d 1172 (9th Cir. 1976) 10

Southern Arizona York Refrigeration Co. v. Bush Mfg. Co., 331 F. 2d 1, 6-7 (9th Cir. 1964) 27

Teamsters, Chauffeurs and Helpers Union v. Morton, 377 U. S. 252 (1964) 12, 16

Textile Workers Union v. American Thread Co., 113 F. Supp. 137 (D. Mass. 1953) 16

Textile Workers Union v. Lincoln Mills, 353 U. S. 448 (1957) 14, 15, 16

Tiidee Products, Inc., 194 NLRB 1234, 1236-37 (1972), modified and enforced, International Union of Electrical, Radio and Machine Workers v. NLRB, 502 F. 2d 349 (D. C. Cir. 1974), cert. den., 417 U. S. 921 (1973) 18, 20, 21

Trustees v. Greenough, 105 U. S. 527 (1882) 9

United Electrical Radio and Machine Workers v. Oliver Corp., 205 F. 2d 376 (8th Cir. 1953) 12

United Steel Workers v. Galland-Henning Manufacturing Co., 241 F. 2d 323 (7th Cir. 1957) 15

Universal Camera Corp. v. NLRB, 340 U. S. 474, 488 (1951) 20

Vaughan v. Atkinson, 369 U. S. 527 (1962) 8, 27

TABLE OF AUTHORITIES—Continued

STATUTES:

	Pages
29 U. S. C. § 158 (b) (4) (i) (ii) (B), Labor Management Relations Act	2
29 U. S. C. § 158 (b) (4) (i) (ii) (D), Labor Management Relations Act	2
29 U. S. C. § 160, Labor Management Relations Act	17
29 U. S. C. § 160 (e), Labor Management Relations Act	17
29 U. S. C. § 160 (1), Labor Management Relations Act	4
29 U. S. C. § 185, Labor Management Relations Act	15
29 U. S. C. § 187, Section 303, Labor Management Relations Act	1, 7
10 Stat. 161-162 (1853)	9

TREATISES AND TEXTS:

C. McCormick, Damages, § 67 at 249 (1935)	14
93 Cong. Rec. 5060	11
93 Cong. Rec. 5074	11

No. 81-497

In The

Supreme Court of the United States

October Term, 1981

SUMMIT VALLEY INDUSTRIES, INC.,
a Montana corporation,

Petitioner,

vs.

LOCAL 112, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT

STATEMENT OF THE CASE

This action was commenced pursuant to Section 303 of the Labor Management Relations Act of 1947, as amended, 29 U.S.C. § 187 (hereinafter "the Act") for the recovery of $13,604.33 in attorneys' fees and for general damages in the amount of $3,675.00[1] sustained as a

1. Petitioner originally sought $11,573.95 in attorneys' fees, $5,000.00 in compensatory damages for the lost time of its plant manager, and $5,000.00 in compensatory damages for the loss of business opportunities, interruptions and delays in its manufacturing process. (J.A. 21)

result of certain conduct deemed violative of Sections 8 (b) (4) (i) (ii) (B) and 8 (b) (4) (i) (ii) (D) of the Act, 29 U. S. C. § 158 (b) (4) (i) (ii) (B) and (D).[2] (J.A. 15-21, 36-37)

On August 28, 1979, the District Court for the District of Montana, the Honorable Russell E. Smith presiding, entered its Findings of Fact and Conclusions of Law awarding $1,175.00 to the Petitioner in general damages for the cost of lost employee services, and denying in total Petitioner's claim for attorneys' fees. (J.A. 5-10)[3] An appeal of Judge Smith's decision was taken to the Ninth Circuit Court of Appeals, and the judgment was affirmed on June 5, 1981. From that order, Petitioner makes this appeal. (J.A. 3-5)

At all times relevant herein, the Petitioner, Summit Valley Industries, Inc., (hereinafter "Summit Valley" or "Petitioner") was a corporation organized under the laws of the State of Montana, engaged in the business of manufacturing pre-built modular homes and selling the finished product to consumers, who in turn contracted individually for the laying of the foundation and job site installation. (J.A. 16, 86-93)

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2. In addition to the unfair labor practice charges referred to above, Respondent was charged in a consolidated complaint with violations of Sections 8 (b) (4) (i) (ii) (A) and 8 (e) of the Act. These charges were not sustained. (J.A. 83-84, 172-174)

3. The record establishes that the Petitioner incurred no actual or additional costs resulting from the absences of its employee and owner, Eugene Spolar. Mr. Spolar was not replaced by the Petitioner during his absences, and he worked additional time to make up for the hours lost. He received no additional compensation from the Petitioner for the additional time. (J.A. 53-54)

The Respondent, Local 112, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, (hereinafter "the Union" or "Respondent") is a labor organization having its principal offices at Butte, Montana. (J.A. 17) For many years, the Union maintained a peaceful and productive collective bargaining relationship with some 50 contractor-employers in the Butte area. (J.A. 93) In 1969, a Butte realtor became the franchised dealer for pre-built modular homes similar to those manufactured by Summit Valley. (J.A. 94) From the standpoint of preserving work for its members, the Union viewed the coming of pre-built modular homes with considerable alarm. In building the traditional stick-built house, skilled carpenters are required to perform all tasks involving woodwork on the foundation, basements, framing, exterior, interior, shingling, and installation of cabinets. Pre-built modular homes however, do not require the use of skilled employees. This necessarily means that there is less job site work for skilled carpenters at modular home construction sites. (J.A. 92-93)

In response to this problem, the Union, the Silver Bow Employers Association, and the Butte Contractors' Association, agreed upon a work-preservation clause which provided, *inter alia*, that, for any given work project, a certain designated minimum amount of work had to be done at the job site by skilled journeyman carpenters. (J.A. 74, 97-101) The National Labor Relations Board, (hereinafter "the Board") determined the validity of this collective bargaining provision and found it to be of a lawful primary nature and a lawful work preservation clause. (J.A. 76-77)

On October 3, 1972, the Respondent's business agent observed a violation of the work preservation clause while checking on a job site which involved the installation of a Summit Valley pre-built modular home. The business agent ordered an employee off the job. Subsequently, on two separate occasions, the Petitioner assigned its own employees to perform installation work traditionally claimed by the Union. The employees of the Petitioner were represented by another bargaining agent, Butte Teamsters Union, Local No. 2. (J.A. 74-75, 105) As a result of Summit Valley's action in assigning its own employees to perform job site work, the Union began to picket the Petitioner's manufacturing plant. On October 11, 1972, the Union assigned one person to carry a picket sign and to park an automobile with a picket sign attached to it near the entrance of the Petitioner's plant. The picketing continued on October 12, 13, 18, 19, 24, and November 7, 1972. On November 8, 1972, the Petitioner successfully sought a restraining order pursuant to Section 10 (l) of the Act, 29 U. S. C. § 160 (l), in the United States District Court for the District of Montana. Thereafter, the picketing was terminated. (J.A. 75-76)

The record clearly establishes that the picketing was directed only to the Petitioner's actions in assigning its employees to perform job site work. At no time did the Union express any interest in representing the employees of Summit Valley, or pursue any object other than the preservation of traditional job site work. (J.A. 149)

There was no evidence tending to establish that the work of Petitioner's employees was ever interrupted or stopped during the picketing, or that the Petitioner suf-

fered any damages due to the loss of business opportunities or interruptions and delays in the manufacturing process.

Administrative Law Judge Penfield specifically found that the Union acted in good faith in undertaking to enforce the work preservation clause, and that the Union and its members complied with the injunction. (J.A. 171)

SUMMARY OF ARGUMENT

Absent explicit and specific statutory or contractual authority, attorneys' fees are not a recoverable item of damage to the prevailing litigant in courts of the United States. Section 303 of the Act does not provide for an award of attorneys' fees, and the legislative history relating to that statute indicates that Congress intended to create no such remedy. The remedy provided for under Section 303 is an effective method of compensating persons who have been damaged by improper secondary or jurisdictional activity, despite the failure of Congress to provide for the recovery of attorneys' fees. Any claim that Section 303 is not effective as written, should be decided by Congress and not the courts.

Under Section 10 (c) of the Act, the power to determine the appropriate remedy for an unfair labor practice, and specifically whether or not the charging party should be allowed to recover its attorneys' fees incurred in unfair labor practice proceedings, belongs solely to the Board. Once that determination is made, a reviewing

court has no authority to substitute its judgment for that of the Board. In the instant case, the Board would not have found the recovery of the charging party's attorneys' fees to be appropriate since the Union sought to enforce its work preservation clause in good faith and did not picket in violation of the injunction. To reverse the decision of the Ninth Circuit Court of Appeals in the context of this case could therefore serve only to subvert the administrative process by allowing a court to impose a remedy which the Board had no opportunity to consider, and under circumstances where the Board itself would have found such a remedy to be inappropriate. Such a reversal would further allow an employer to unduly influence the outcome of a Section 303 damage action by mere choice of forum.

The fact that the efforts of an attorney operate to mitigate a client's damages does not render as recoverable the fees paid to that attorney. Such a distinction is insufficient to support or justify an exception to the general rule against the recovery of attorneys' fees absent statutory or contractual authority.

The First, Third, Fifth, Sixth and Eighth Circuit Courts of Appeal have taken the position that attorneys' fees incurred in prior Section 8 (b) (4) proceedings may be recovered when necessary to mitigate losses resulting from a work stoppage and when directly related to achieving a resumption of work. Petitioner's claim for attorneys' fees is not within the purview of these holdings, since no work stoppage occurred at the Summit Valley plant.

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ARGUMENT

The Ninth Circuit Was Correct In Ruling That An Employer, In An Action Under Section 303, Is Not Entitled To Recover Attorneys' Fees Incurred In Prior Proceedings Before The National Labor Relations Board.

A. The Ninth Circuit Ruling is Consistent with the Applicable Statutes and Cases.

The Ninth Circuit ruling that damages under Section 303, 29 U. S. C. § 187, do not include reimbursement for attorneys' fees incurred before the Board, is based upon that Circuit's prior decision in *Mead v. Retail Clerks International Association*, 523 F. 2d 1371 (9th Cir. 1975). In a carefully researched and well-reasoned opinion, the court in *Mead* set forth several points in support of its decision:

> 1. Such an award violates the long standing rule that, absent statutory authorization or contractual provision, attorneys' fees are ordinarily not recoverable;
>
> 2. The language of Section 303 completely fails to provide a statutory basis for an award of attorneys' fees;
>
> 3. Congressional intent as expressed by the legislative history of Section 303 unequivocably demonstrates that only actual compensatory business losses, and not attorneys' fees, are recoverable in a Section 303 action;

4. Congressional intent, as expressed in Section 10 (c) of the Act, clearly precludes an award of attorneys' fees by the courts.

Five years after its decision in *Mead*, the Ninth Circuit reaffirmed its holding in *Maxey v. Butchers Union, Local No. 126*, 627 F. 2d 912 (9th Cir. 1980). The Ninth Circuit's ruling in the instant case was understandably brief given the well-settled state of the law in that Circuit as expressed in the *Mead* and *Maxey* decisions.

B. In the United States, Attorneys' Fees are Not Recoverable by a Prevailing Litigant Absent Statutory or Contractual Authorization.

For over 200 years, it has been an established principle of American jurisprudence that, absent statutory or contractual authority, attorneys' fees are not a recoverable item of damage. *F. D. Rich Co. v. United States ex rel. Industrial Lumber Company*, 417 U. S. 116 (1974); *Hall v. Cole*, 412 U. S. 1 (1973); *Arcambel v. Wiseman*, 3 Dall. 306 (1796). While this rule has been the subject of certain judicially created exceptions, it has nonetheless been consistently upheld and followed. *Alyeska Pipeline Service Co. v. The Wilderness Society*, 421 U. S. 240 (1975); *Vaughan v. Atkinson*, 369 U. S. 527 (1962); *Artvale, Inc. v. Rugby Fabrics Corp.*, 232 F. Supp. 814 (D. C. N. Y. 1964).

In *Alyeska*, the issue before this Court was whether to use the "private attorneys general" doctrine to create an exception to the general rule barring the recovery of attorneys' fees.

After conducting an exhaustive examination into the origin and development of the general rule, this Court de-

clined "to fashion a far-reaching exception to this 'American Rule'." *Alyeska, supra,* at U. S. 247.

The *Alyeska* ruling reaffirms a long line of cases commencing with the *Arcambel* decision of 1796, wherein this Court held that unless so authorized by statute, an award of attorneys' fees was improper.

In 1853, Congress passed legislation expressly limiting the circumstances under which the expenses of litigation could be assessed against a losing party in federal cases, and further limiting the amount of such costs to the sums set forth in the Act. 10 Stat. 161-162 (1853).

In addition to the "private attorneys general" theory examined in *Alyeska,* certain other judicially created exceptions have been developed. Under the "collateral litigation" theory, a person forced by the wrongful act of another to bring or defend a suit against a third party may recover attorneys' fees from the person who acted wrongfully. *Forsythe v. Starnes,* 554 S. W. 2d 100 (Mo. App. 1977). Pursuant to the "bad faith" and "common benefit" theories, the court may invoke its historic equitable power to award attorneys' fees when a litigant's conduct is vexatious, frivolous, in bad faith or when a specific group of persons benefit from litigation designed to protect property held in trust. *Guardian Trust Co. v. Kansas City Southern Ry.,* 28 F. 2d 233 (8th Cir. 1928); *Trustees v. Greenough,* 105 U. S. 527 (1882).

These exceptions have been applied to permit the award of attorneys' fees only where they are not expressly forbidden by Congress:

> "Congress has not repudiated the judicially fashioned exceptions to the general rule against allowing

substantial attorney fees; but neither has it retracted, repealed or modified the limitations on taxable fees contained in the 1853 statute and its successors. Nor has it extended any roving authority to the Judiciary to allow counsel fees as costs or otherwise whenever the Courts might deem them warranted. *What Congress has done, however, while fully recognizing and accepting the general rule, is to make specific and explicit provisions for the allowance of attorneys' fees under selected statutes granting or protecting various federal rights.*" (emphasis added).

Alyeska, supra, at U. S. 260.

C. In the Instant Case, No Statute or Contract Authorizes an Award of Attorneys' Fees.

Petitioner neither alleges a contractual basis for the award of attorneys' fees, nor asserts that any of the exceptions of the general rule are applicable in this case. Therefore, the only remaining basis for an award of attorneys' fees is to be found, if at all, in the language of Section 303 of the Act. As this Court made clear in *Alyeska,* any federal statute which purports to form the basis for an award of attorneys' fees must make a specific and explicit provision for the allowance thereof. The requirement for explicit and specific language aside, an examination of Section 303 discloses a total absence of any provision for the award of attorneys' fees. *Sillman v. Teamsters Local 386,* 535 F. 2d 1172 (9th Cir. 1976); *Bryant Air Conditioning & Heating Co., Inc. v. Sheet Metal Workers Local No. 541,* 472 F. 2d 969 (8th Cir. 1973).

The legislative history of Section 303 establishes that the failure to provide for attorneys' fees was a direct response to congressional intent as expressed by Senator Taft during the Senate debate relating to the bill:

> "I see no reason why suits of this sort should not be permitted to be filed. After all, it is only to restore to people who lose something because of boycotts and jurisdictional strikes the money which they have lost." 93 Cong. Rec. 5060.
>
> • • •
>
> "Under the Sherman Act the same question of boycott damage is subject to a suit for damages and attorney's fees. In this case we simply provide for the amount of actual damages." 93 Cong. Rec. 5074.

Despite the express language of the statute and the clear indication of congressional intent to the contrary, Petitioner contends an award of attorneys' fees as compensatory damages is supported by congressional policy as set forth in Section 303. In support of this contention, the Petitioner argues that by enacting Section 303, Congress was desirous of providing an effective remedy to employers who became the objects of secondary boycotts and jurisdictional strikes, and that the remedy as set forth in Section 303 (b) cannot be effective unless the power to award attorneys' fees is read into it. Certainly, Congress intended to create an effective remedy through the passage of Section 303. But to suggest that the remedy provided is in some manner ineffective or incomplete merely because it does not provide for an award of attorneys' fees, is to directly contradict the specific findings of Congress and the actual results achieved under the law.

Through the enactment of Section 303, Congress meant to provide to all employers damaged by secondary or jurisdictional activity, a direct recourse for the recovery of the resulting business losses. Senator Taft thought Section 303 to be a most effective remedy. At

no time did he or any other Senator state that attorneys' fees were to be a recoverable item of damage or show any concern that the statute would not be effective as a deterrent, despite the fact that attorneys' fees were not recoverable.

The statute in question was not enacted for the purpose of providing a deterrent for any particular activity. Section 303 simply gives any injured party, regardless of the size of its business, the right to recover damages which are "the direct and proximate result of the proscribed conduct." *Carpenters Local No. 978 v. Markwell*, 305 F. 2d 38, 47 (8th Cir. 1962). The items of damage held to be compensable under Section 303 cover the entire field of losses which might potentially be suffered by an employer. See *Teamsters, Chauffeurs and Helpers Union v. Morton*, 377 U.S. 252 (1964) [losses due to the inability of the employer to perform pursuant to the terms of a contract]; *Sheet Metal Workers Local No. 223 v. Atlas Sheet Metal Co.*, 384 F. 2d 101 (5th Cir. 1967) [cost of subcontracting jobs affected by the work stoppage, expense of overtime pay required to "catch-up" on work delayed by picketing, salaries of employees rendered nonproductive by virtue of the strike]; *United Electrical Radio and Machine Workers v. Oliver Corp.*, 205 F 2d 376 (8th Cir. 1953) [overhead expenses where the productive output of the employer was reduced below its normal level as a result of unlawful activity].

Damage awards made pursuant to Section 303 have subjected various labor organizations to tremendous potential and actual liability. See *Eazor Exp., Inc. v. International Bhd. of Teamsters*, 520 F. 2d 951, 974 (3rd Cir. 1975) [over $1,000,000 in compensatory damages]; *Cape-*

letti Brothers, Inc. v. Local 487, 514 F. 2d 1239 (5th Cir. 1975) [over $97,000 in compensatory damages]; *Mason-Rust v. Laborers Local No. 42,* 435 F. 2d 939 (8th Cir. 1970) [over $69,000 in compensatory damages]; *Local 984 v. Humko Co.,* 287 F. 2d 231 (6th Cir. 1961) *cert. den.,* 366 U.S. 962 (1960) [over $84,000 in compensatory damages].

Petitioner challenges the practical effectiveness of a Section 303 action in which an award of attorneys' fees is not contemplated. But in reviewing the record herein, it becomes abundantly clear that the problem lies not within the statute, but with the substance of Petitioner's own case.

Contrary to Petitioner's contention, there is nothing inherently difficult about proving monetary losses other than attorneys' fees in a Section 303 action. The Ninth Circuit, consistent with the dictates of this Court and many other courts, has held that damages should be calculated under:

> "[A] relatively relaxed standard of proof, allowing recovery on evidence supporting 'a just and reasonable inference' more likely true than not that the employer was damaged because of picketing or other union pressure . . ."
>
> *Mead, supra,* at 1379. See also *Local 984 v. Humko, supra.*

The record establishes that despite the relaxed standard of proof applicable in Section 303 actions, Petitioner was unable to demonstrate that it suffered any substantial loss in the categories of damage generally considered compensable under Section 303. In point of fact, Petitioner was obliged to amend its complaint and strike all

items of damage except the small loss incurred for the loss of the plant manager's time and the Petitioner's attorneys fees:

> "MR. ROBINSON: At this time, Your Honor, I'd like to file a motion with the Court to amend by interlineation certain references to damages in the Complaint."
>
> * * *
>
> "MR. ROBINSON: As to paragraph number thirteen, referring to loss of business opportunities and interruptions and delays, at line number two, page number six of the Complaint, strike all of the words and lines two through six thereof.
>
> "THE COURT: So ordered."

(J.A. 36-37).

Petitioner's ultimate failure to allege and prove any substantial business losses resulting from Respondent's activity immediately establishes the instant case as an action brought virtually for the sole purpose of recovering attorneys' fees in a prior action. The rule applying to such a situation is well settled:

> "[W]here an action based on the same wrongful act has been prosecuted by the plaintiff against the defendant to be a successful issue, he cannot in a subsequent action recover, as damages, his costs and expenses in the former action." *Ritter v. Ritter,* 381 Ill. 549, 46 N. E. 2d 41, 44 (1943). *See also C. McCormick, Damages,* § 67 at 249 (1935).

Petitioner contends that the award of attorneys' fees as damages under Section 303 would be in accord with this Court's definition of the role of the federal courts in fashioning remedies under the Act to effectuate its purposes. To support this contention, Petitioner quotes from the opinion in *Textile Workers Union v. Lincoln*

Mills, 353 U.S. 448 (1957). Petitioner's reliance on that case is wholly misplaced.

In *Lincoln Mills*, this Court was called upon to deal with certain issues surrounding the enforcement of a collective bargaining agreement under Section 301 (a), 29 U.S.C. § 185, of the Act. The enforcement of such an agreement brings into focus complex policies which go to the very core of labor law in this country.

Prior to the enactment of Section 301, suits by and against unincorporated labor organizations were difficult to maintain as a practical matter. Unless a union was incorporated, all of its members were entitled to service. In cases where the union had a large membership, often residing in a variety of states, the problem of identifying and locating union members was insurmountable. With the passage of Section 301, all of the courts examining the issue agreed that this problem had been resolved. Labor organizations were now suable, whether or not they were incorporated as a legal entity. See *International Ladies' Garment Workers Union, AFL, et al v. Jay-Ann Co., Inc.*, 228 F. 2d 632 (5th Cir. 1956). Beyond this point, the various federal courts were in hopeless disagreement. Some courts held that Section 301 was merely jurisdictional, and that because it displaced common law, could not be expanded upon to provide a remedy under which the provisions of a collective bargaining agreement would be specifically enforced. See *United Steel Workers v. Galland-Henning Manufacturing Co.*, 241 F. 2d 323 (7th Cir. 1957); *Mercury Oil Refining Co. v. Oil Workers Union*, 187 F. 2d 980 (10th Cir. 1951). Other courts took the position that Section 301 authorized the federal courts to fashion a body of law which was more responsive to

the problem of breaches of a collective bargaining agreement *Textile Workers Union v. American Thread Co.*, 113 F. Supp. 137 (D. Mass. 1953).

Relying on the specific legislative history indicating a congressional purpose to encourage and promote the faithful performance of collective bargaining agreements, this Court ruled in *Lincoln Mills*, that Section 301 was remedial as well as procedural, and that the statute did not displace common law so as to preclude the application of substantive law fashioned by the federal courts from the policy of our own national labor laws.

Unlike the statute construed by this Court in *Lincoln Mills*, Section 303 has been held to have completely displaced common law by the "sweep of federal statutes":

> "[A]s we have held, substantive state law in this area must yield to federal limitations. In short, this is an area 'of judicial decision within which the policy of the law is so dominated by the sweep of federal statutes that legal relations which they affect must be deemed governed by federal law having its source in those statutes, rather than by local law.' Sola Electric Co. v. Jefferson Electric Co., 317 U.S. 173, 176. Accordingly, we hold that since state law has been displaced by § 303 in private damage actions based on peaceful union secondary activities, the District Court in this case was without authority to award punitive damages."
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> *Teamsters Local Union No. 20 v. Morton, supra,* at U.S. 261.

There is an obvious distinction to be made between the role of the federal court under Section 301 and its function under Section 303. Under Section 301, it becomes the duty of the federal courts to, in effect, borrow the principle of specific performance from the common law in

order to implement the intent of Congress that collective bargaining agreements be enforceable. However, Section 303 is simply a provision creating a money damage remedy in addition to the authority previously and specifically granted to the Board. It is the only provision in the Act which creates such a remedy. Section 303 carries with it no general mandate from Congress to effectuate the policies of national labor relations law. Under Section 10 (c) of the Act, only the Board has that authority. Petitioner's attempt to expand the role of the federal courts under Section 303 by analogy to the basic policy considerations formulated under Section 301 is clearly inappropriate.

D. Congressional Intent as Expressed in Section 10 (c) of the Act Precludes a Court Award of Attorneys' Fees.

The expanded role of the federal courts in Section 303 damage actions, as envisioned by the Petitioner, is unsupportable in the context of the decisions of this Court, and further conflicts directly with the mandates and intentions of Congress in the enactment of Section 10 of the Act, 29 U.S.C. § 160.

Pursuant to Section 10 (a) of the Act, only the Board, and not the court, is empowered by Congress to prevent the occurrence of unfair labor practices. Upon the finding of fact that an unfair labor practice has occurred, only the Board, and not the court, is empowered to enjoin the offender and ". . . to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act." 29 U.S.C. § 160 (c).

The significance and parameters of the statutory mandate as set forth in Section 10 (a) and 10 (c) of the Act, has long been settled by this Court. In *NLRB v. Food Store Employees Union, Local 347*, 417 U.S. 1 (1974), the Board successfully prosecuted an unfair labor practice complaint against the employer. As a part of the remedy, an order was sought which would have required the employer to pay to the Board and the union their costs and attorneys' fees incurred in the investigation, preparation and presentation of the case pursuant to the Board's ruling in *Tiidee Products, Inc.*, 194 NLRB 1234, 1236-37 (1972), *modified and enforced, International Union of Electrical, Radio and Machine Workers v. NLRB*, 502 F.2d 349 (D.C. Cir. 1974), *cert. den.* 417 U.S. 921 (1973). The Board declined to do so and the District of Columbia Circuit Court of Appeals ordered the Board to determine the amount of these costs and require their payment. In ruling that such an exercise of authority by the Court of Appeals was improper, this Court held as follows:

> "The integrity of the administrative process demands no less than that the Board, not its legal representative, exercise the discretionary judgment which Congress has entrusted to it. But since a plausible reconciliation by the Board of the seeming inconsistency was reasonably possible, it was 'incompatible with the orderly function of the process of judicial review,' NLRB v. Metropolitan Life Ins. Co., supra, at 444, for the Court of Appeals to enlarge the Heck's order without first affording the Board an opportunity to clarify the inconsistencies. It is a guiding principle of administrative law, long recognized by this Court, that 'an administrative determination in which is imbedded a legal question open to judicial review does not impliedly foreclose the administra-

tive agency, after its error has been corrected, from enforcing the legislative policy committed to its charge.' [citing cases] Thus, when a reviewing court concludes that an agency invested with broad discretion to fashion remedies has apparently abused that discretion by omitting a remedy justified in the court's view by the factual circumstances, remand to the agency for reconsideration, and not enlargement of the agency order, is ordinarily the reviewing court's proper course. Application of that general principle in this case best respects the congressional scheme investing the Board and not the courts with the broad powers to fashion remedies that will effectuate national labor policy. It also affords the Board the opportunity, through additional evidence or findings, to reframe its order better to effectuate that policy. [citing cases] Moreover, in this case, if the Court of Appeals correctly read Tiidee as having signaled a change of policy in respect of reimbursement, a remand was necessary, because the Board should be given the first opportunity to determine whether the new policy should be applied retroactively."

NLRB v. Food Store Employees, supra at U.S. 9-10.

This Court's decision in *Food Store* serves to clearly establish two essential concepts. First, assuming that the Board has the power to remedy an unfair labor practice by requiring the payment of attorneys' fees[4], the Board,

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4. In the *Food Store* case at footnote 9, this Court explained that its decision could not be considered as authority for the proposition that the Board's broad powers under Section 10 (c) of the Act, includes the power to order reimbursement for attorneys' fees. However, it is submitted that such an issue is irrelevant to the instant case, just as it was in *Food Store*. If the broad language of Section 10 fails to grant the Board such a power, certainly such a power could not be implied to the court by the restrictive language of Section 303. Pursuant to the statute, if such a power exists at all, it must belong to the Board. The point is, assuming *arguendo*, that the Board has such authority, then the Board's decision to exercise that power must be accorded the deferrence required by this Court's ruling in *Food Store*.

and not the courts have the sole statutory authority, pursuant to Section 10 of the Act, to impose such a remedy. Regardless of whether or not the attorneys' fees remedy is sought against a defending labor organization or a recalcitrant employer, the Board must have the sole power to decide the appropriateness of the remedy in order to achieve the goals intended by Congress. Second, once the Board has made the necessary determination, its decision, being entitled to the deferrence and respect traditionally accorded to administrative orders by this Court, may not be modified unless the matter has been remanded for reconsideration in view of the applicable law as expressed by the reviewing court. It is well settled that a reviewing court should not "displace the Board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before *de novo*. *Universal Camera Corp. v. NLRB*, 340 U. S. 474, 488 (1951).

Contrary to its assertions, the rule that Petitioner now asks this Court to adopt is totally inconsistent with the statutory mandate granted by Congress to the Board. For over ten years, pursuant to its sole authority to effectuate the purposes of the Act, the Board has on occasion, awarded attorneys' fees to the charging party in order to promote industrial peace by ensuring speedy access to Board and court dockets through the discouragement of frivolous litigation. Under the rule in *Tiidee*, the Board will impose such a remedy where, in the proper case, the charged party's defense is frivolous or in bad faith.

In recognition of the limits of its authority under Section 303, and the broad limits of discretion granted to the

Board by Section 10 of the Act, the Ninth Circuit refused to adopt the rule sought by Petitioner. Seeking to minimize the risk of inconsistent adjudication and to protect the integrity of the administrative process as required by this Court in *Food Store,* the Ninth Circuit identified the primary basis for its decision as follows:

> "If attorneys' fees incurred in Board proceedings could be recovered in every case by subsequent section 303 action, it would circumvent the Board's rule allowing recovery of such fees only where the defense is frivolous or in bad faith. This case illustrates the point. In its present posture the only portion of the judgment that could be sustained constitutes an award of precisely those attorneys' fees that the Board (and the Court of Appeals) would not make. Such a rule would also interfere with the Board's exercise of its 'broad discretion to order a violator "to take such affirmative action . . . as will effectuate the policies of [the Act]", 29 U.S.C. § 160 (c).' NLRB v. Food Store Employees, supra, 417 U.S. at 8, 94 S.Ct. at 2079. It is for the Board, not the courts, to determine whether the conflicting interests are best resolved by imposing litigation costs upon the defeated party before the Board." *Mead, supra* at 1381.

In the instant case, Petitioner never presented a claim for the recovery of attorneys' fees at the administrative level, nor was any request made by the Petitioner to make such an award part of the remedy. In reviewing the record as developed in the underlying unfair labor practice proceedings, it is not difficult to determine why Petitioner failed to make this claim.

Clearly, this is not the type of case in which the Board would have assessed attorneys' fees against the charged party pursuant to its *Tiidee* doctrine. The rem-

edy recommended by Administrative Law Judge Penfield in this case invoked basically the common cease and desist order and the posting of notice. In explanation, Judge Penfield stated as follows:

> "I see no reason for departure from the usual posting practice with regard to the notice. The members will be sufficiently apprised of the holding thereby, and there is no reason to believe that they, or the local, will not abide by the requirements of the order. I have found that Carpenters sought Article XXII in good faith, and that at the time it undertook the enforcement efforts herein found to have had a proscribed object, Carpenters had some reason to believe such might be lawful. Carpenters has been enjoined from enforcement of Article XXII by court order since November 1972. It does not appear that the injunction had unusual dissemination, and it has not been shown that Carpenters or their members have not complied therewith, or that Summit Valley or Boise Cascade have been confronted with difficulties in marketing their houses in the Butte area during this period."
>
> (J.A. 171) (See also J.A. 140-141, 143-144, 149-150, 154).

To reverse the decision of the Ninth Circuit in this case, as Petitioner suggests, would be to allow a recovery of attorneys' fees to the Petitioner under circumstances where the Board would not, and did not, allow such an award. Petitioner's position urges, therefore, the precise result which this Court was expressly attempting to avoid in *Food Store*, and could serve only to significantly weaken the essential administrative process created by Congress in the field of labor relations.

As the Ninth Circuit recognized in *Mead*, the point is more profoundly illustrated when viewed in the context of the Section 303 proceeding itself:

> "If there had been no prior Board proceedings and the illegality of the clause had been established in this action, the Meads could not have recovered the attorneys' fees attributable to that incremental effort. The result should be no different because this essential element was established in a separate proceeding before the Board." *Mead, supra* at 1381.

Section 303 proceedings may generally be divided into two basic stages. The employer must first establish that the conduct complained of is an unfair labor practice under Section 8 (b) (4). In such cases as that presented here, where the question of illegality is first presented to the Board, the administrative decision collaterally estops further litigation on the issue. (*See generally*, J.A. 28-29 and cases cited therein.) Once the issue of illegality is established, the employer has only to prove his damages. There is no legal dispute as to whether attorneys' fees incurred in the Section 303 proceeding itself are recoverable as compensatory damages—clearly they are not. *Bryant, supra.*

Under these circumstances, the rule proposed by the Petitioner would operate to grant to the employer tremendous potential influence over the ultimate liability of a labor organization in Section 303 cases. If the employer chose first to seek a court determination of the illegality of the conduct, no attorneys' fees could be awarded. Yet, under the rule proposed by the Petitioner, if the employer, in his sole discretion, chose first to go before the Board,

the attorneys' fees incurred by the employer in that proceeding would be recoverable.

Such a rule would not only serve to completely subvert the administrative process, but would transfer to the employer an unwarranted degree of control over the appropriate remedy in cases arising out of Section 8 (b) (4). In accordance with the well recognized principles stated above, the power to make such a determination rests solely with the Board, subject to court review. No statute or legal principle in the field of labor relations can be cited to support the incredible notion that the employer, in proceedings arising out of Section 8 (b) (4), may influence the appropriate remedy by mere choice of forum. Such a situation could only exist in total disregard of the administrative process and congressional intent as expressed in Section 10 (c).

In the final analysis, it must be recognized that the rule advanced by Petitioner would operate to the detriment of both employer and union alike. For if the courts are empowered to award attorneys' fees against the union under circumstances where the Board itself would decline to do so under Section 8 (b) (4), then what is to prevent the courts from ordering the Board to award attorneys' fees to the union in the context of a Section 8 (a) (5) proceeding, as the District of Columbia Court of Appeals attempted to do in *Food Store*?

In view of congressional intent as expressed in Sections 303 and 10 of the Act, and the dictates of this Court in *Food Store*, the direction which must be taken by this Court is clear. An award of attorneys' fees by the court in the context of this case would be beyond any statutory

authority. Such an award conflicts directly and irreparably with the administrative process which was so carefully constructed by Congress and so avidly protected by the decisions of this Court.

E. A Sum Paid to an Attorney for the Purpose of Securing a Legal Determination May Not Be Recovered Regardless of the Effect of the Attorneys' Efforts.

In *Associated General Contractors v. Construction and General Laborers, Local 563*, 612 F. 2d 1060 (8th Cir. 1979), the Eighth Circuit Court of Appeals adopted the rule that an employer, in a subsequent 303 action, may recover attorneys' fees incurred in a prior Board proceeding held for the purpose of securing a resumption of work. With the exception of the Ninth Circuit's decision in *Mead*, the Eighth Circuit's ruling remains the only opinion which provides in any detail, the rationale for the position it has taken[5]:

> "Aimed at mitigating the losses resulting from a work stoppage, and at preserving the enterprise, they are analogous to costs of subcontracting and overtime. They are within the purview of Section 303 (b) as other courts have held." *Id.* at 1064.

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5. On page 13 of its initial brief, Petitioner suggests that six Circuit Courts of Appeal have considered the question presented by this case. Respondent would agree that the Third, Fifth, Sixth and Eighth Circuits have adopted some type of rule which provides for the allowance of attorneys' fees. However, the position taken by the First Circuit is somewhat equivocal. In *F. F. Instrument Corp. v. Union de Tronquistas de Puerto Rico*, 558 F. 2d 607 (1st Cir. 1977), the First Circuit merely ruled that "even if we were to adopt [the rule allowing fees to assist in the removal of a picket line and filing a charge], we would not go beyond it." *Id.* at 611.

It is respectfully submitted that the Eighth Circuit's reliance on its distinction between attorneys' fees incurred in prior Board proceedings and any other class of attorneys' fees is seriously misplaced and fundamentally in error. Such a distinction is without support in any statute or decision of this Court. Regardless of its effect, a sum paid to an attorney for the purpose of securing a legal determination is an attorney's fee, and as such, is not recoverable absent some statutory or contractual authority. The mere fact that the action of the attorney so employed operates to mitigate the damages of his or her client does not render such expenses recoverable as a business loss. Conceivably, a business person might employ an attorney in an infinite variety of ongoing causes of action which could reduce the potential liability of the adverse party—but certainly, this fact cannot serve as a basis to award the costs of such activity as an item of compensable damage. An attorneys' fee may not, by mere judicial fiat, be termed as a compensable item of damage simply because a court has chosen to analogize its effect with such business expenses as subcontracting and overtime. Yet, in apparent disregard of accepted principles of labor relations law and the decisions of this Court, the Eighth Circuit has accomplished just that. To accept the rule urged upon this Court by Petitioner would be to directly contradict 200 years of viable statutory and judicial principles. In view of this Court's decision in *Alyeska*, such a quantum leap in the field of statutory construction will obviously not be permitted.[6]

---

6. On page 18 of its initial brief herein, Petitioner asserts that this Court has recognized the expense of attorneys'

(Continued on next page)

Petitioner maintains that congressional policy has been frustrated due to the unavailability of a remedy which would allow for the recovery of the attorneys' fees it was "forced to assume". Petitioner's attempt, by this contention, to equate its own private interests with congressional labor policy, fails in the context of Section 10 (b) of the Act, which imposes upon the Board the duty to investigate and prosecute valid unfair labor practices. As this Court has recognized:

> "Moreover, a charging party's participation in the case is, the Board found, primarily for the purpose of protecting its private interests, whereas the Board has the primary responsibility for protecting the public interest. The Board therefore concluded that, although the public interest might also arguably be served 'in allowing the Charging Party to recover the costs of its participation of this litigation,' that consideration did not 'override the general and well-established principle that litigation expenses are ordinarily not recoverable.'"

Food Store, supra at U. S. 6.

(Continued from previous page)

fees to be an element of compensatory damages. In *Vaughan v. Atkinson, supra,* this Court did approve an award of attorneys' fees as an item of damages, but only in the context of a traditional exception to the American Rule—the "bad faith" exception. The remainder of the authorities cited on that page by Petitioner, similarly fit within the recognized exceptions to the rule under the "collateral litigation" theory. None of these doctrines have any application to the instant case. *Southern Arizona York Refrigeration Co. v. Bush Mfg. Co.,* 331 F. 2d 1, 6-7 (9th Cir. 1964); *Bertero v. National General Corporation,* 529 P. 2d 608, 620 (Cal. 1975); *St. Paul Fire & Marine Ins. Co. v. Crosetti Bros., Inc.,* 475 P. 2d 69, 72 (Or. 1970). This would apply also to those cases cited by the Petitioner wherein attorneys' fees have been granted in actions seeking damages for the breach of the duty of fair representation.

In any event, Petitioner's remonstrances regarding the frustration of congressional policy have no relation to the issue before this Court. The issue here must be decided on the basis of what Congress has done—not what it ought to have done. If, indeed, congressional policy has been frustrated by the failure of Section 303 to provide for the recovery of attorneys' fees, then it would appear that Congress is the only appropriate body to remedy such a situation:

> ". . . [T]he rule followed in our courts with respect to attorney's fees has survived. It is deeply rooted in our history and in congressional policy; and it is not for us to invade the legislature's province by redistributing litigation costs. . . ."
>
> *Alyeska, supra* at 1618.

F. Petitioner's Claim for Attorneys' Fees Is Not Within the Boundaries of the Position Taken By the First, Third, Fifth, Sixth and Eighth Circuits.

Petitioner argues that its claim for attorneys' fees would have been allowed if the matter had been decided in the First, Third, Fifth, Sixth or Eighth Circuits. However, in view of the position taken by these courts, such a contention would appear to be without foundation.

Taken together, the holdings as rendered by these various Circuit Courts, would consider attorneys' fees to be a compensable item of damage under Section 303 when two basic conditions are met:

1. The attorneys' fees incurred are directly related to achieving a resumption of work, and;

2. The attorneys' fees incurred are necessary to mitigate a loss resulting from a work stoppage.

In the instant case, the record clearly indicates that no work stoppage occurred at the Summit Valley plant and that the Petitioner suffered no damages resulting from the loss of business opportunities or from delays or interruptions in production. Petitioner's claim for attorneys' fees must therefore be deemed to be both factually deficient and legally distinguishable from the cases presented in the First, Third, Fifth, Sixth and Eighth Circuits.

CONCLUSION

For the foregoing reasons, the relief which Petitioner seeks should be denied and the Judgment of the Ninth Circuit Court of Appeals should be affirmed.

Respectfully submitted,

DAVID S. PAULL
PAUL T. BAILEY
BAILEY & PAULL

208 Bailey Building
5441 S. W. Macadam Avenue
Portland, Oregon 97201
Telephone: (503) 221-0077

Attorneys for Respondent

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Petitioner's Reply Brief

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No. 81-497

In The

Supreme Court of the United States

October Term, 1981

SUMMIT VALLEY INDUSTRIES, INC.,
a Montana corporation,

Petitioner,

vs.

LOCAL 112, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S REPLY BRIEF

DONALD C. ROBINSON
POORE, ROTH & ROBINSON, P.C.
1341 Harrison Avenue
Butte, Montana 59701-4898
Telephone: (406) 782-1223
Attorney for Petitioner

Of Counsel: DOUGLAS A. BUXBAUM
POORE, ROTH & ROBINSON, P.C.
1341 Harrison Avenue
Butte, Montana 59701-4898
Telephone: (406) 782-1223

COCKLE PRINTING CO., 2311 Douglas St., Omaha 68102

TABLE OF CONTENTS

Pages

Table of Authorities i

Argument 1

I. The issue presented in this case must be determined by analysis of the policy and purposes of Federal Labor Law, not by recourse to common law principles of damages and remedies. 1

II. The Respondent improperly focuses upon the forum in which the fees were incurred, and ignores the adjudicatory purposes which the fees sought to achieve. 5

III. The rationale of the American Rule and the cases reaffirming that Rule do not bar the recovery of Petitioner's preemptive legal expenses as damages under Section 303. 9

IV. The federal courts have the sole responsibility to determine and select damage remedies under Section 303. 12

V. Summit Valley is entitled to the attorneys' fees and related expenses of litigation which it seeks under the prevailing Rule. 15

Conclusion 21

TABLE OF AUTHORITIES

CASES

Alyeska Pipeline Service Company v. The Wilderness Society, 42 U. S. 240, 257 (1975) 2, 9

TABLE OF AUTHORITIES—Continued

Pages

Associated General Contractors of Minnesota v. Construction and General Laborers Local No. 563, 612 F. 2d 1062-1064 (8th Cir. 1979) 5, 10, 11

Boys Markets v. Retail Clerks Union, 398 U. S. 235 (1970) 2

Clark Engineering v. Carpenters, 510 F. 2d 1075 (6th Cir. 1975) 8

F. D. Rich Co. v. Industrial Lumber Co., 417 U. S. 116 (1974) 11, 12

F. F. Instruments v. Union de Tronquistas de Puerto Rico, 558 F. 2d 607 (1st Cir. 1977) 8, 11, 14, 18, 19

Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U. S. 714, 718 (1967) 10, 11, 12

IBEW v. Foust, 442 U. S. 42 (1979) 2, 12

International Boxing Club of New York v. United States, 358 U. S. 242, 252 (1959) 19

International Longshoremen's and Warehousemen's Union v. Juneau Spruce Corporation, 342 U. S. 237 (1951) 13

International Union, Local 283 v. Scofield, 382 U. S. 205, 219-221 (1965) 17

Mead v. Retail Clerks International Association, 523 F. 2d 1371 (9th Cir. 1975) 5, 6, 7, 8, 9

Mills v. Electric Auto-Lite, 396 U. S. 375, 390-391 (1970) 9

TABLE OF AUTHORITIES—Continued

Pages

NLRB v. Food Store Employees, 417 U. S. 1 (1974) 14, 15

NLRB v. Gissel Packing Co., 395 U. S. 575, 612 n. 32 (1969) 14

Retail Clerks, Local 1288 (Nickel's Pay-Less Stores and James Mead and Roger Mead, d/b/a Mead's Market), 163 NLRB No. 112, 64 LRRM 1433 (1967) 7

Ritter v. Ritter, 46 N. E. 2d 41 (Ill. 1943) 12

San Diego Building Trades Council v. Garmon, 359 U. S. 236 (1959) 2

Teamsters Local 20 v. Morton, 377 U. S. 252, 261 (1964) 2, 4, 12

Texas Distributors, Inc. v. Local 100, Plumbers, 598 F. 2d 393, 401 (5th Cir. 1979) 19

Textile Workers Union v. Lincoln Mills, 353 U. S. 448 (1957) 2

Tidee Products, Inc. 194 NLRB 1234, 1236-37 (1972), mod. and enf. 502 F. 2d 349 (D. C. Cir. 1974), cert. den. 417 U. S. 921 (1973) 14, 15

Vaughan v. Atkinson, 369 U. S. 527 (1962) 10

FEDERAL STATUTES

15 U. S. C. §§ 1051-1127 11

29 U. S. C. § 158, Section 8 (b) (4), Labor-Management Relations Act of 1947 ..... 5, 13, 17, 20

29 U. S. C. § 160(c), Section 10(c), Labor-Management Relations Act of 1947 14

TABLE OF AUTHORITIES—Continued

Pages

29 U. S. C. § 160(e), Section 10(e), Labor-Management Relations Act of 1947 ..... 14, 15

29 U. S. C. § 160(k), Section 10(k), Labor-Management Relations Act of 1947 ..... 17, 20

29 U. S. C. § 160(l), Section 10(l), Labor-Management Relations Act of 1947 17

29 U. S. C. § 187, Section 303, Labor-Management Relations Act of 1947 ..... 1, 2, 4, 5, 6, 7, 8, 9, 12, 13, 14, 15, 18

29 U. S. C. § 187 (b) 2

40 U. S. C. § 270 (a), et seq. 11

TEXTS

Legislative History of the Labor-Management Relations Act of 1947, NLRB (1948), p. 1371 2

93 Cong. Rec. 4858 3

MISCELLANEOUS CITATIONS

Rule 52(a), Federal Rules of Civil Procedure 19

Rule 101.9(c)(2), Rules of National Labor Relations Board, 29 C. F. R. § 101.9(c)(2) (1981) 15

Rule 102.8, Rules of National Labor Relations Board, 29 C. F. R. § 102.8 (1981) 18

Rule 102.38, Rules of National Labor Relations Board, 29 C. F. R. § 102.38 (1981) 18

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Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S REPLY BRIEF

ARGUMENT

I. The issue presented in this case must be determined by analysis of the policy and purposes of Federal Labor Law, not by recourse to common law principles of damages and remedies.

The Respondent's principal argument, that the American Rule precludes Summit Valley's recovery of preemptive legal expenses under Section 303, should be rejected. The parties here, as well as the AFL-CIO as *amicus curiae*, recognize that the American Rule does not preclude recovery of attorneys' fees where they are properly award-

able as a remedy pursuant to statute. See, e. g., *Alyeska Pipeline Service Company v. The Wilderness Society*, 42 U. S. 240, 257 (1975). This is such a case.

The statute here in question, Section 303, allows recovery of all "damages . . . sustained" to Summit Valley's "business or property." 29 U. S. C. § 187 (b). "The policy of the [national labor] law," as this Court has said, "is so dominated by the sweep of federal statutes that legal relations which they affect must be deemed governed by federal law having its source in those statutes. . . ." *Teamsters Local 20 v. Morton*, 377 U. S. 252, 261 (1964). This is then, essentially, another case in which this Court is called upon to decide what remedies best effectuate the national labor policies underlying the Act and can be applied consistent with it. See, e. g., *San Diego Building Trades Council v. Garmon*, 359 U. S. 236 (1959); *IBEW v. Foust*, 442 U. S. 42 (1979); *Textile Workers Union v. Lincoln Mills*, 353 U. S. 448 (1957); *Teamsters Local 20 v. Morton*, 377 U. S. 252 (1964); *Boys Markets v. Retail Clerks Union*, 398 U. S. 235 (1970). The rule prevailing in the federal circuit courts, allowing recovery of legal expenses necessarily incurred to stop illegal activity, maintain the *status quo*, and mitigate damages, best effectuates the policies underlying Section 303, and renders such kinds of legal expenses recoverable by statute, specifically outside the parameters of the American Rule.

In enacting Section 303, Congress had two goals plainly in mind: To make the victims of illegal secondary boycotts and jurisdictional strikes whole for all their "actual" losses, *Morton*, 377 U. S. at 260, n. 16, and to deter labor organizations from engaging in illegal self-help activity. See comments of Senator Taft at 2 Legislative

History of the Labor-Management Relations Act of 1947, NLRB (1948), p. 1371 ("I think the threat of a suit for damages is a tremendous deterrent to the institution of secondary boycott and jurisdictional strikes").[1]

The prevailing rule best accommodates the "make whole" and "deterrent" policies of the statute because it would have the following effects: It would deter unions from engaging in unlawful self-help activity by removing any expectation that the financial burdens imposed on the employer, in the form of legal expenses, would motivate the employer to capitulate to illegal demands. It would facilitate the vindication of employers' rights under the Act by enhancing the ability to seek redress in a legal forum. It would properly reimburse the party who is mitigating damages in a legal forum, and assess damages against the labor law violator who is engaged in conduct deliberately designed to create economic injury. It would facilitate labor peace by promoting prompt settlements with the NLRB and thus cessation of illegal conduct. It would enhance the preservation of a fledgling and innovative enterprise, like Summit Valley, which seeks entry into the marketplace in a way which changes established but outmoded utilization of labor for production or construction. It is realistically consistent with the policy of Congress to "restore to people who lose something because of boycotts and jurisdictional strikes the money which they have lost." 93 Cong. Rec. 4858.

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1 Compare Brief of Respondent, at 12, where it states that "[t]he statute in question was *not* enacted for the purpose of providing a deterrent for any particular activity" (emphasis supplied).

To refuse recovery of legal expenses required to obtain a "cease and desist" remedy and mitigate the loss would thus be inconsistent with a proper and logical interpretation of Section 303, and it would have the effect of frustrating national labor policy. The rule prevailing in the Circuits, and which Summit Valley urges for adoption here, however, comports with declared congressional intent to make the victim whole and to deter the illegal activity. Respondent and *amicus curiae* are preoccupied with a common law principle excluding attorneys' fees as a remedial award to a prevailing litigant. While Respondent acknowledges that "Section 303 has been held to have completely displaced common law by the 'sweep of federal statutes'" (Brief of Respondent, at 16, citing *Morton*, 377 U. S. at 261), it urges, without reasoned analysis of federal labor law, the application of a common law rule which would impede the very goals which Section 303 was designed to achieve.

While the American Rule may not necessarily be displaced by the Act, clearly the question before the Court must be resolved principally by reference to the statutory language and policy of federal labor law. On that ground, the conclusion is inevitable that the prevailing rule best accords with the remedial and deterrent purposes of Section 303 and can be applied consistent with that statute and outside the proscriptions of the American Rule. Indeed, as Respondent itself has recognized, this Court in *Teamsters Local 20 v. Morton, supra*, made it clear that it will not allow remedies otherwise available under state law to dictate the consideration of the remedies that are to be applied under Section 303. Conversely, federal and state common law principles of damages and remedies,

from which the American Rule has developed, should not dictate an *exclusion* of otherwise appropriate remedies under Section 303. Neither the Respondent nor the *amicus curiae* have addressed, let alone demonstrated, why awarding the Petitioner the attorneys' fees sought in the instant case would be contrary to the purposes and policies of Congress when it enacted Sections 303 and 8 (b) (4) of the Act.

II. The Respondent improperly focuses upon the forum in which the fees were incurred, and ignores the adjudicatory purposes which the fees sought to achieve.

Contrary to the *amicus'* assertion that only the Ninth Circuit has considered the interplay between the type of recovery sought here and the American Rule, the Eighth Circuit in *Associated General Contractors v. Construction and General Laborers, Local 563,* 612 F. 2d 1060, 1062-1064 (8th Cir. 1979) specifically addressed, and critically discussed, the Ninth Circuit's reliance upon the American Rule in the context of a Section 303 action. The Eighth Circuit's analysis, discussed in Petitioner's opening Brief, speaks for itself and will not be repeated here. The *amicus'* assertion that no other Circuit has explained how recovery in the instant case is consistent with the American Rule, is simply in error.

The *amicus curiae* argues that the Ninth Circuit's analysis in *Mead v. Retail Clerks International Association,* 523 F. 2d 1371 (9th Cir. 1975), is entitled to greater deference because its consideration of the American Rule demonstrates that certain anomalies in results would occur that would offend the logic of the rule. Similarly, the Respondent relies heavily upon what the Circuit Court in *Mead* perceived to be an anomalous result if attorneys' fees in the NLRB litigation were considered to be com-

pensatory damages in a Section 303 action. The *Respondent* quotes *Mead*:

> "If there had been no prior Board proceedings and the illegality of the clause had been established in this action, the Meads could not have recovered the attorneys' fees attributable to that incremental effort. The result should be no different because this essential element was established in a separate proceeding before the Board. *Mead, supra*, at 1381."

Using the *Mead* analysis, Respondent argues (Brief for Respondent, 23), that the employer, by mere choice of forum, would be in a position to dictate whether or not it would be entitled to eventually recover its attorneys' fees incurred in determining whether the conduct was illegal. The argument is made that the employer would in effect receive an award of attorneys' fees if it litigated the legality of the secondary boycott before the NLRB, but that it admittedly would not receive them if the illegality was adjudicated in the Section 303 action.

This issue as raised by the Ninth Circuit indicates that that court was expressing its reluctance to award attorneys' fees as compensatory damages when they were incurred in an after-the-fact NLRB determination of conduct that had ceased *voluntarily by the union* and without any apparent necessity *of an NLRB adjudication* to obtain a *cessation* of that conduct. Thus, while not expressly articulated, it appears that the reluctance to allow the attorneys' fee portion of the damages claimed was due to the fact that it was not demonstrated in *Mead* that those fees were necessarily incurred to prevent further damages from occurring.[2]

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2 Picketing in *Mead* occurred in the context of negotiations that included a demand for a "demonstrator" clause. The

(Continued on following page)

The Ninth Circuit implicitly ignores the fundamentally distinct roles of the Board and the courts in proceedings instituted to obtain a permanent cessation of the illegal secondary and jurisdictional conduct. If the union's conduct is on-going and is causing damages at the time the victimized employer retains counsel and commences its unavoidable expenditure of legal fees, then the employer can only utilize the cease-and-desist, and corollary Section 10(1) temporary injunctive relief, provisions of the Act. Those provisions are triggered only by filing an unfair labor practice charge with the NLRB.

The Respondent Union, and the Circuit Court in *Mead,* suggest that a different result relative to the award of damages in the form of attorneys' fees would occur, depending upon which remedy of the Act was chosen by the employer. However, to the extent that a party would litigate, solely under Section 303, the final determination of illegality, and thereby create the situation described in *Mead,* then either the illegal conduct *would have already ceased* (in which case the employer is admittedly not entitled to attorneys' fees), or the employer would

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(Continued from previous page)

picketing to obtain the clause commenced Dec. 30, 1964, nd ended Jan. 14, 1966. However, on October 6, 1965, the union voluntarily withdrew the clause as a demand in negotiations. The damages award covered the period of time beginning with the commencement of picketing and ending with the withdrawal of the clause. *Mead,* 523 F. 2d at 1374, note 4. Although the opinion in *Mead* does not note when the employer initially filed a proceeding with the NLRB to determine the illegality of the clause sought by the union, it is clear that the Board's decision, issued April 3, 1967, occurred long after the union had voluntarily terminated the conduct that was eventually determined by the NLRB to be illegal. See *Retail Clerks, Local 1288 (Nickel's Pay-Less Stores and James Mead and Roger Mead, d/b/a Mead's Market),* 163 NLRB No. 112, 64 LRRM 1433 (1967).

have simply abandoned any efforts to obtain a cessation of the on-going injury and would only be seeking monetary damages.[3]

The proper distinction, therefore, is not in which *forum* the victim incurs the attorneys' fees. Rather, it is whether the attorneys' fees were incurred to obtain immediate cessation of on-going conduct or whether they were merely incurred after the fact to obtain a determination of whether the conduct was in violation of federal labor law. If, in the situation described by the Court in *Mead,* the union's conduct has voluntarily ceased with the reasonable expectation that it will not recur, then the employer who incurs attorneys' fees to obtain an adjudication of liability—*whether before the NLRB or the courts* —is *not* entitled to be compensated in a Section 303 action for the attorneys' fees incurred in the adjudication of liability. *F. F. Instruments v. Union de Tronquistas de Puerto Rico,* 558 F. 2d 607 (1st Cir. 1977). If, however, those fees were incurred because the employer had no alternative but to expend legal fees before the NLRB, the only forum available to obtain a cessation of illegal conduct that is presently occurring and that is immediately injurious, then the majority of the Circuit Courts have properly reasoned that attorneys' fees incurred in such a proceeding are compensable.

Thus, both the Ninth Circuit and the Respondent Union fail to address the issue in its proper context. Arguments which focus on the forum in which the fees are incurred, and not upon the adjudicatory purposes for

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3 An employer would not be entitled to attorneys' fees as compensatory damages when it commenced a Section 303 action because the NLRB had refused to initiate cease-and-desist proceedings. See, e. g., *Clark Engineering v. Carpenters,* 510 F. 2d 1075 (6th Cir. 1975).

which the fees are expended, essentially beg the question. They lend nothing to the analysis of whether Section 303 contemplates the recovery of attorneys' fees as compensatory damages when incurred in NLRB proceedings to restore the secondary boycott victim to the *status quo*.

The ultimate question is whether federal labor law rights are more properly vindicated, and its policies and purposes more properly enhanced, by shifting the damages sustained, incurred in the form of unavoidable attorneys' fees, to the wrongdoer union rather than to the victimized employer. The Ninth Circuit in *Mead* and the Respondent Union sidestep this ultimate question by improperly grounding their analysis upon the traditional American Rule and by focusing on the forum in which the employer's legal expenses were incurred.

III. The rationale of the American Rule and the cases reaffirming that Rule do not bar the recovery of Petitioner's preemptive legal expenses as damages under Section 303.

As discussed *supra*, the American Rule is not applicable here because the legal expenses sought are recoverable by statute.[4] Because Respondent and *amicus curiae* rely so heavily on the rule, however, Petitioner feels constrained to reply further.

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4 Section 303, Respondent points out, does not contain an express statutory authorization to allow recovery of fees by a prevailing litigant. That omission bars recovery for attorneys' fees incurred for the prosecution of the Section 303 action itself, see, *Alyeska*, 421 U. S. at 257, which Summit Valley is not claiming, but it does not necessarily mean that attorneys' fees incurred to stop the illegal activity and mitigate the employer's damages are not recoverable as compensatory damages. Even *Mead*, upon which Respondent primarily relies, recognizes that distinction. 523 F. 2d at 1380. See also *Mills v. Electric Auto-Lite*, 396 U. S. 375, 390-391 (1970).

Neither Respondent nor the AFL-CIO demonstrate how any underlying rationale of the American Rule would be offended by adopting the damage rule urged here by Summit Valley and accepted by most lower courts. The fact is that the rationale does not apply in this case.

The reason for the rule stated most often is that it prevents the shifting of attorneys' fees which, if allowed, could have the effect of chilling accessability of the courts to resolve disputes and vindicate rights, especially for the poor. See, e. g., *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U. S. 714, 718 (1967). In the situation presented here, however, an employer who is confronted with illegal secondary boycott or jurisdictional activities, and who must make an unavoidable expenditure of legal fees in order to mitigate the damages caused by that activity, is the party for whom access to the legal process is critical. The labor organization that is attempting to deliberately inflict economic damage upon the employer, through extrajudicial self-help conduct, has palpably demonstrated its rejection of the legal process. The labor union against whom attorneys' fees might be assessed in such a situation can hardly argue that its accessability to a legal forum has been discouraged.

Further, the American Rule applies to preclude an award of attorneys' fees as such, to a prevailing litigant. It has no application where those fees are truly compensatory damages. *Associated General Contractors*, 612 F. 2d at 1063. This Court so held in *Vaughan v. Atkinson*, 369 U. S. 527 (1962), and reaffirmed that holding in *Fleischmann*, 386 U. S. at 718, where it noted that in "appropriate circumstances," counsel fees may be awarded *"as an item of compensatory damages"* (citing *Vaughan*). That is the situation here. The legal expenses Summit

Valley incurred were in "mitigation of harm" and were "closely related" to the illegal conduct. *F. F. Instruments*, 558 F. 2d at 611. They simply took the place of much more serious damages which would have been suffered if the *status quo* were not maintained. *Associated General Contractors*, 612 F. 2d at 1064. As such, the preemptive legal expenses sought here are compensatory damages recoverable under Section 303.

Respondent and *amicus curiae* rely also on *F. D. Rich Co. v. Industrial Lumber Co.*, 417 U. S. 116 (1974), and *Fleischmann*, 386 U. S. 714 (1967), for the proposition that the American Rule applied in those cases precludes recovery here. That reliance is misplaced. Both cases involve requests for an award of attorneys' fees in the case at hand, and as such, merely reaffirm the traditional outlines of the rule. Those cases, moreover, involve two completely different statutory schemes than the Act involved here. *F. D. Rich* involved a Miller Act claim. 40 U. S. C. § 270 (a), *et seq.*, in which this Court characterized the plaintiff's claim for attorneys' fees as a bald claim for additional compensation ". . . in the context of everyday commercial litigation." 417 U. S. at 130. *Fleischmann* involved a claim for attorneys' fee compensation to the prevailing party in the context of the Lanham Act, 15 U. S. C. §§ 1051-1127, which this Court believed would proscribe such recovery *as a matter of statutory construction*. *Id.*, at 719-721.[5] As noted, *infra*, *Fleischmann* does recognize the right to recover fees as "compensatory damages" under "appropriate circumstances," as Summit Valley con-

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5 The *amicus* attempts to postulate the holding of *Fleischmann* in the context of a claim for attorneys' fees in obtaining an injunction to terminate a deliberate trademark

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tends here. *F. D. Rich* and *Fleischmann*, therefore, as applied to this case, do little more than reaffirm the American Rule. They certainly do not relate in any way to the propriety or impropriety of allowing preemptive legal expenses as damages under Section 303, other than to recognize that such legal expenses can be "compensatory damages," as Petitioner has demonstrated.[6]

IV. The federal courts have the sole responsibility to determine and select damage remedies under Section 303.

Respondent, but not the AFL-CIO as *amicus*, argues that the federal courts are required to defer to NLRB

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infringement (Brief of *amicus*, at 14-15). However, the attorneys' fees awarded in *Fleischmann* by the lower court encompassed all attorneys' fees for the prosecution of the entire action, pursuant to a long line of cases that had held that attorneys' fees were allowed to the prevailing party "when deliberate infringement of a valid trademark has been established." *Fleischmann*, 386 U. S. at 714. There is no indication in *Fleischmann* that the plaintiff sought to limit its recovery to attorneys' fees incurred to terminate the infringement. *Fleischmann* simply holds that the showing of a deliberate trademark infringement will not sustain the award of attorneys' fees to the prevailing party.

6 Respondent and *amicus* also rely on *Ritter v. Ritter*, 46 N. E. 2d 41 (Ill. 1943), for the proposition that under principles of state common law attorneys' fees incurred in a prior case cannot be recovered by the expedient of filing a subsequent action for recovery of the fees previously incurred. In *Ritter*, the plaintiff sought to establish a novel tort theory for the recovery of legal expenses where a previous action resulted in a judgment that title was wrongfully withheld from him. Summit Valley here asserts no such theory. Moreover, in *Morton*, 377 U. S. at 261, this Court held that principles of state substantive law have been preempted by congressional enactment of the Act, wherever state principles conflict with it. See, also, *IBEW v. Foust*, 442 U. S. 42, 47 (1979). Thus *Ritter* is not authority for the *exclusion* of any remedy which this Court believes will effectuate the purposes of the Act, because state substantive law cannot have the effect of altering or displacing congressional policy and intent as expressed by the Act.

determinations of damage remedies, and therefore that if the NLRB has not awarded fees to the party before it, the court cannot do so in a subsequent Section 303 action. That analysis cannot be made consistent with the plain language of the Act or its legislative history, and to accept Respondent's argument would have the effect of judicially revamping the remedial scheme created by the Act.

In *International Longshoremen's and Warehousemen's Union v. Juneau Spruce Corporation*, 342 U. S. 237 (1951), this Court analyzed the remedial relationship between the NLRB and the federal courts. There the union argued that the courts had no power under Section 303 to make an independent determination of the legality of picketing in the context of an alleged jurisdictional strike [Section 8 (b) (4) (D), 29 U. S. C. § 158 (b) (4) (D)], until *after* the Board had made such a determination. This Court rejected that argument, and clearly outlined the respective power of the Board and the courts under Sections 8 (b) (4) and 303 of the Act:

> "The fact that the two sections have an identity of language and yet specify two different remedies is strong confirmation of our conclusion that the remedies provided were to be independent of each other. Certainly, there is nothing in the language of Section 303 (a) (4) which makes its remedy dependent on any prior administrative determination that an unfair labor practice has been committed. Rather, the opposite seems to be true. * * *."
>
> *Id.*, at 244.

The Act makes clear, as this Court noted in *Juneau Spruce*, that the administrative and judicial remedies provided for victims of secondary boycotts and jurisdictional strikes are separate but can be concurrent. Their respective remedial schemes are not dependent upon each other. The courts are exclusively empowered to provide money

damage remedies under Section 303 (b), and the Board is exclusively empowered to issue "cease and desist" orders under Section 10 (c). The mere fact that the Board may occasionally award attorneys' fees to a party where his opponent's defense was "frivolous" or "in bad faith," see *Tidee Products, Inc.*, 194 NLRB 1234, 1236-37 (1972), mod. and enf. 502 F. 2d 349 (D. C. Cir. 1974), cert. den. 417 U. S. 921 (1973), should not affect in any way a court's choice of money damage remedies in an independent Section 303 action. *F. F. Instruments*, 558 F. 2d at 611.[7] Congress gave the power to select such remedies to the courts under Section 303. A contrary rule would confuse a Section 303 action with an enforcement proceeding under Section 10 (e), 29 U. S. C. § 160 (e), where the courts are properly required to defer to the Board's selection of remedies. *NLRB v. Gissel Packing Co.*, 395 U. S. 575, 612, n. 32 (1969).[8]

For the same reasons, Respondent's reliance on *NLRB v. Food Store Employees*, 417 U. S. 1 (1974), is misplaced. The issue there was whether the Court of Appeals misconstrued its enforcement and review powers under Sections

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7 The Court noted:

"The Board may sometimes choose to award attorneys' fees in such circumstances [Section 10 (c) proceedings], *but this is a separate matter*" (emphasis supplied).

8 In its view of the scheme of remedies available to the victim of a secondary boycott, the Respondent would have the employer submit its claim for attorneys' fees only to the NLRB in the Section 10 proceedings, a gesture which not only would be ineffectual but extremely incongruous:

If the Board is required to make the same kinds of determinations that are made by the federal courts in Section 303 suits, but only as to that aspect of damages relating to attorneys' fees, the claim for such damages would be needlessly bifurcated between the Board and the courts, and would be litigated duplicatively in both forums.

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10 (e) and (f) of the Act by concluding that the Board's newly announced rule in *Tidee Products* would apply in the case before it. This Court simply held that the Court of Appeals could not be so clairvoyant and ordered a remand to the Board. The issue of whether a federal court in a Section 303 action must defer to remedies choices previously made by the Board was not before this Court in *Food Store Employees* and was not addressed. The Respondent's reliance on that case is totally inappropriate.

V. Summit Valley is entitled to the attorneys' fees and related expenses of litigation which it seeks under the prevailing Rule.

Respondent and *amicus* contend that even if this Court adopted the rule prevailing in the circuits, Summit Valley

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Additionally, the Ninth Circuit's view of the Board's role, as urged by Respondent, fails to take into account how a victimized employer would litigate his claim before the Board for damages comprised of attorneys' fees when the union has entered into a formal settlement agreement prior to the Board's adjudication. Since the charging party generally has no right to insist upon further Board adjudication after the Regional Director and General Counsel approve such a settlement (see Rule 101.9(c) (2), Rules of National Labor Relations Board, 29 C. F. R. § 101.9 (c) (2) (1981)), the victimized employer would have no further opportunity to submit, to any forum, his claim for that portion of his damages that accrued in the nature of attorneys' fees incurred in obtaining cessation of the illegal conduct.

Finally, the Respondent's view of the role of the Board in assessing the responsibility for attorneys' fees arising out of secondary boycotts would envision an assessment by the Board as to whether the union acted in "bad faith" or whether it had defended its position "frivolously." Thus, the Board would be required to superimpose upon Section 303, by administrative determination, two classes of illegal secondary boycotts. Obviously, Congress intended no such result. Since Congress determined that secondary boycotts and jurisdictional disputes are inherently destructive of the business and property rights of persons who are powerless to resolve such disputes, there is no rational basis for inviting the NLRB to in effect make non-statutory distinctions between the severity of illegal secondary boycotts.

could not recover the fees and related litigation costs which it seeks here. Respondent and *amicus* argue that recovery would not be proper because the illegal activity was halted prior to the time that the bulk of the fees and expenses were incurred. The AFL-CIO argues in its *amicus* brief that Summit Valley cannot recover them because counsel for Summit Valley was a "volunteer" in those proceedings, and consequently, the fees and expenses were not reasonably incurred.[9] The Respondent further contends that since no "work stoppage" occurred, the Petitioner should not be entitled to attorney fees even if the prevailing rule were adopted by this Court. All of these arguments may be disposed of by reference to the record before the Court.

Regarding the argument of the *amicus* that counsel for Summit Valley was a "volunteer," the record reflects that no such argument has *ever* been raised in this proceeding by the Respondent Union itself. No such defense was asserted at the trial court level, nor was such defense asserted on appeal to the Ninth Circuit or to this Court. It is a new issue here. Those facts notwithstanding, the *amicus* AFL-CIO who is a complete stranger to these proceedings but for its filing an *amicus* brief in this Court, suddenly appears to argue that the fees and expenses sought were not reasonably or necessarily incurred.

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9 It is noteworthy that the Respondent Union expended $30,869.55 for fees and expenses in the NLRB litigation between Dec. 1973 and Jan. 1976 [see Respondent's Answers to Interrogatories 7 (a)-(c)], whereas in comparison the Petitioner incurred only $13,604.33 for the *entire* period of the NLRB and enforcement litigation. The differential certainly suggests: (1) The Union had no difficulty in stipulating to the reasonable value of Petitioner's attorneys' fees; and (2) the Petitioner's counsel did not, as *amicus* implies, attempt to assert the "laboring oar" in the litigation.

It is true that for purposes of the secondary boycott charges and jurisdictional dispute charges filed by Summit Valley pursuant to Sections 8 (b) (4) (B) and (D) of the Act, the General Counsel of the National Labor Relations Board is primarily responsible for prosecuting the charge before the NLRB. This Court has recognized, however, that the interests of the General Counsel and the charging party are not congruent. The General Counsel is primarily responsible for assuring that the "public interest" is vindicated through the enforcement of the Act; the charging party, on the other hand, is responsible for safeguarding and advocating its own "vital private rights" in such proceedings. *International Union, Local 283 v. Scofield*, 382 U. S. 205, 219-221 (1965). The charging party has obviously significant interests in Board proceedings which it is entitled to have protected through its own counsel.

Further, with respect to the jurisdictional dispute aspect of this case, the Act does not allow counsel for the NLRB to bring or prosecute those charges. Thus, the legal fees incurred in the Section 10 (k) proceeding must necessarily be incurred by counsel for the charging party, if the charging party is to be represented at all before the Board in those proceedings.[10]

Concerning the argument that fees are not recoverable for any representation of Summit Valley after the initial Section 10 (l) temporary injunction was issued,

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10 Given the fact that the result of the 10 (k) decision was such a critical factor in determining, in subsequent administrative proceedings, whether the Union committed a violation of Section 8 (b) (4) (D), see J.A. 167-170, it simply is not plausible to suggest that counsel for the charging party be required to refrain from participating in the interrelated administrative proceedings. The argument also overlooks the critical role that the attorney for the private party often plays in assisting the General Counsel in presentation of un-

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the record also makes clear that those fees are recoverable under and consistent with the prevailing rule. The trial court found as fact that because of "continued threats on the part of the Union, it was necessary to employ attorneys from the time of the commencement of the picketing" until this Court denied certiorari, which resulted in the Petitioner incurring legal fees and related costs in the amount of $13,604.33, "to stop the Union's violations of the Act" (J. A. 7). At trial, counsel for the Union *stipulated* that the sum was an accurate amount incurred for the representation and costs provided by the counsel for the Charging Party "in the prosecution of the NLRB proceedings" (J. A. 35).

The AFL-CIO argues that under the rule announced by the First Circuit in *F. F. Instruments*, 558 F. 2d at 611, "petitioner neither reconciles its claim with what the First Circuit there decided nor refutes that Court's *persuasive* analysis" (Brief of *amicus*, at 21; emphasis supplied). Summit Valley certainly agrees that the First Circuit's analysis in *F. F. Instruments* is "persuasive." However, the situation with which Summit Valley was confronted was much different than that presented in *F. F. Instruments*.[11] Here, the Respondent Union continued to assert its right to engage in activity which was consistently held

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fair labor practice cases. Thus, the general practice, of both employers and unions, to have private counsel actively participate on behalf of the charging party in unfair labor practice cases, reflects recognition that charging parties generally find it essential to actively participate in protecting their interest as a "party" to the proceeding. See Rules 102.8 and 102.38, Rules of National Labor Relations Board, 29 C. F. R. § 102.8 and § 102.38 (1981).

11 In effect, the AFL-CIO incorrectly suggests that the *F. F. Instruments* decision established an "apportionment" rule. In *F. F. Instruments*, the First Circuit held that attorneys' fees may be recovered as damages pursuant to Section 303

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to be illegal.[12] Indeed, the Petitioner's counsel was also forced to initiate contempt proceedings for the Respondent's failure to comply with the Board's order after enforcement was granted by the Circuit Court. On that basis, the trial court found, as noted above, that it was necessary to maintain counsel throughout the entire course of the litigation for the purpose of maintaining the *status quo*. To that extent, the fees and litigation expenses incurred by Summit Valley, which it seeks as damages under Section 303 of the Act here, are recoverable in accordance with the approach taken by the First Circuit in *F. F. Instruments*, which indicates that counsel fees incurred to prevent "a recurrence" of the illegal picketing are recoverable. *Id.*, at 610; see, also, *Texas Distributors, Inc. v. Local 100, Plumbers*, 598 F. 2d 393, 401 (5th Cir. 1979). Findings of fact will not be disturbed on appeal unless they are demonstrated by Respondent to be "clearly erroneous." Rule 52(a), Federal Rules of Civil Procedure; *International Boxing Club of New York v. United States*, 358 U. S. 242, 252 (1959).

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where incurred to stop the illegal activity and mitigate the harm, but it refused to allow recovery on the facts of that case because the illegal activity was *voluntarily* ceased *one day* after the employer filed unfair labor practice charges; consequently, the Court determined that since almost all of the employer's legal fees were incurred in an after-the-fact adjudication of the Union's conduct, none of the fees were compensable. *F. F. Instruments*, 558 F. 2d at 610-611. However, once the trial court determines, as it did in this case, that *all* of the attorneys' fees were necessarily incurred to obtain *and* retain the *status quo*, then the court need not determine whether there is any need to apportion the fees incurred throughout the NLRB proceedings. Again, the Respondent has never asserted that the Petitioner's fees should be apportioned if the Court was to award them at all (see Respondent's Memorandum of Law to the District Court, Aug. 6, 1979).

12 For example, the Administrative Law Judge found that the Union had failed, as required by NLRB rules, to assert with-

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Notwithstanding the District Court's finding that it was "necessary to the survival" of Summit Valley to employ attorneys (J.A. 6), and notwithstanding its failure to offer any evidence at the trial of this action, the Respondent Union now argues that since no "work stoppage" occurred the Petitioner is not entitled to recover its attorneys' fees under the rule prevailing in the First, Third, Fifth, Sixth and Eighth Circuits. This argument is clearly refuted by the fact that "work stoppages" did occur at the homes of Petitioner's customers when Union carpenters were threatened with fines and other union sanctions if they continued working on Summit Valley's homes (see J.A. 106-108; 113; 172). Indeed, those work stoppages were the essence of the Section 8 (b) (4) (B) violations. Furthermore, the illegal picketing of Petitioner's plant resulted in injury that was as severe as a work stoppage—the refusal of retail customers to cross the picket line to purchase Petitioner's products. The principal owner and manager of Summit Valley, describing the effects of the illegal picketing, stated:

> "A: (By Mr. Spolar) We wouldn't have had no business . . . (w)e would have had no customers to buy our product because nobody would cross that picket line to buy a house from us.
>
> "Q: Is that based upon your experience in observing the response (by) the public to picket lines in Butte, Montana?
>
> "A: It was my experience when we had the pickets . . . ."

J.A. 60.

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out equivocation, that picketing of either the Petitioner's plant or its customers' houses will be "altogether abandoned," notwithstanding the Section 10 (k) award of the work to the union representing Petitioner's employees (J.A. 169). Similarly, the Circuit Court, in the enforcement proceeding, noted that the Respondent "threatened to continue picketing the site to enforce the claim rejected in the 10 (k) award." 574 F. 2d at 457; J.A. 194.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals for the Ninth Circuit entered in Cause No. 79-4663 should be reversed.

Respectfully submitted,

DONALD C. ROBINSON
POORE, ROTH & ROBINSON, P.C.
1341 Harrison Avenue
Butte, Montana 59701-4898
Telephone: (406) 782-1223

Of Counsel: DOUGLAS A. BUXBAUM
POORE, ROTH & ROBINSON, P.C.
1341 Harrison Avenue
Butte, Montana 59701-4898
Telephone: (406) 782-1223

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Amicus Brief

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No. 81-497

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

SUMMIT VALLEY INDUSTRIES, INC.,
Petitioner,

v.

LOCAL 112, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

MOTION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE AND BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

J. ALBERT WOLL
815 15th Street, N.W.
Washington, D.C. 20005

LAURENCE GOLD
815 16th Street, N.W.
Washington, D.C. 20006
202-637-5390
(Counsel of Record)

Of Counsel:

GEORGE KAUFMANN
2101 L Street, N.W.
Washington, D.C. 20037

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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MOTION BY THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS FOR LEAVE TO FILE A BRIEF AMICUS CURIAE IN SUPPORT OF RESPONDENT

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) respectfully moves this Court for leave to file the accompanying brief *amicus curiae* in support of the position of the respondent in this case.

INTEREST OF THE AFL-CIO AND THE ISSUES TO BE COVERED IN THE AFL-CIO'S BRIEF AMICUS CURIAE

The AFL-CIO is a federation of 102 national and international unions with a total membership of 14,500,000 working men and women.

The American Federation of Labor and Congress of Industrial Organizations is a federation of approximately 102 national and international unions with a total membership of approximately 14,500,000 working men and women. The present case involves the question whether a plaintiff in an action under § 303 of the Labor Management Relations Act of 1947 may recover as damages for a violation of § 8(b)(4) of that Act the attorneys' fees expended in ancillary unfair labor practice proceedings. The question is important to the AFL-CIO because its affiliates and their subordinate unions are potential defendants in § 303 suits, in part because "the tapestry which has been woven in classifying [conduct as primary or secondary], is among the labor law's most intricate". *NLRB v. Operating Engineers*, 400 U.S. 297, 303. In the tendered brief we urge that the recovery which plaintiffs seek is fundamentally inconsistent with the "American Rule" which ordinarily refuses to allow the successful party to collect such fees from its adversary; we show that both on principle and on precedent the American Rule calls for denial of recovery for fees expended in related litigation between the same parties. Additionally, our brief goes beyond respondent's argument to show that even if the American Rule is put aside the petitioner here could recover only a small portion of its claim, because (1) most of the fees were expended after the union's picketing had been enjoined, and therefore are "too remote to be regarded as a component of the damages flowing from the" violation of § 8(b)(4) (*F. F. Instrument v. Union de Tronquistas*, 558 F. 2d 607, 611 (1st Cir.); and second, because petitioner was a volunteer in most of the unfair labor practice proceedings.

CONCLUSION

For the above-stated reasons this motion for leave to file a brief *amicus curiae* should be granted.

Respectfully submitted,

J. ALBERT WOLL
815 15th St., N.W.
Washington, D.C. 20005

LAURENCE GOLD
815 Sixteenth St., N.W.
Washington, D.C. 20006
(202) 637-5390
(Counsel of Record)

Of Counsel:
GEORGE KAUFMANN
2101 L St., N.W.
Washington, D.C. 20037

TABLE OF CONTENTS

MOTION:	Page
Interest of the AFL-CIO and the Issues to be Covered in the AFL-CIO's Brief Amicus Curiae	i
Conclusion	iii
BRIEF:	
Statement of the Case	1
Summary of Argument	2
Argument	6
I. Plaintiff's "Damages" Theory Is Fundamentally Inconsistent with the "American Rule" Concerning Attorneys' Fees	6
II. Even If Petitioner Could Avoid the "American Rule", It Could Recover Only a Small Part of the Attorneys' Fees Claimed	20
Conclusion	24

TABLE OF AUTHORITIES

Cases: Page

Alyeska Pipeline Co. v. Wilderness Society, 421 U.S. 240 ..... 6, 13, 18, 19
Amalgamated Workers v. Edison Co., 309 U.S. 261.. 22
Arcambel v. Wiseman, 3 Dall. (3 U.S.) 306 9
Bender v. Crown, 551 F.2d 169 (7th Cir.) 5
Brown v. GSA, 425 U.S. 820 9
Burns v. Alcala, 420 U.S. 575 9
Day v. Woodworth, 13 How. (54 U.S.) 363 ..... 9, 14
Eazor Express, Inc. v. International Brotherhood of Teamsters, Etc., 520 F.2d 951 (3d Cir. 1975), *cert. denied*, 424 U.S. 935 18
F.D. Rich Co. v. Industrial Lumber Co., 417 U.S. 116 ..... 4, 6, 15, 16, 17, 18, 20
F.F. Instrument Corp. v. Union de Tronquistas de Puerto Rico, 558 F.2d 607 (1 Cir. 1977) 5, 17, 21, 23
Flanders v. Tweed, 15 Wall. (82 U.S.) 450 ..... 3, 9 ,13, 14
Fleischmann Corp. v. Maier Brewing Co., 386 U.S. 714 ..... 2, 4, 6, 14, 15, 17, 18, 19
Grace v. Ludwig, 484 F.2d 1262 (2d Cir.), *cert. denied*, 416 U.S. 905 ..... 5, 22, 23
Great Coastal Express, Inc. v. International Brotherhood of Teamsters, 511 F.2d 839 (4th Cir.), *reh. den.*, 532 F.2d 956, *cert. denied*, 425 U.S. 975 8
Hall v. Cole, 412 U.S. 1 ..... 19, 20
Longshoremen v. Juneau Spruce Co., 342 U.S. 237.. 8
Maier Brewing Company v. Fleischmann Distilling Corp., 359 F.2d 156 (9 Cir. *en banc*) 14
Mead v. Retail Clerks Int. Assn., Etc., 523 F.2d 1371 (9 Cir.) 3, 4, 8, 9, 10, 15, 17, 18, 20, 21
Mills v. Electric Auto-Lite Co., 396 U.S. 375 ..... 19, 20
NLRB v. Amax Coal Co., —— U.S. ——, 49 U.S.L. Wk. 4880 (June 29, 1981) 9
Noranda Aluminum, Inc. v. United Brotherhood of Carpenters, Etc., 382 F. Supp. 1258 (E.D. Mo.), *affirmed*, 528 F.2d 1304 (8 Cir.), *cert. den.*, 429 U.S. 835 8
Perrin v. United States, 444 U.S. 37 ..... 3, 9

TABLE OF AUTHORITIES—Continued

	Page
Ritter v. Ritter, 381 Ill. 549, 46 N.E.2d 41 (1943)	3, 4, 10, 11, 13, 14, 15, 18, 20
Sheet Metal Workers, Etc. v. Atlas Sheet Metal Co., 384 F.2d 101 (5 Cir.)	21
Teamsters Union v. Morton, 377 U.S. 252	3, 6, 8
Vaca v. Sipes, 386 U.S. 171	19
Vaughan v. Atkinson, 369 U.S. 527	18
Statutes:	
Labor Management Relations Act of 1947, 61 Stat. 136, 29 U.S.C. § 141 *et seq.*:	
§ 8(b)(4)	8, 19, 22
8(b)(4)(B)	2
8(b)(4)(D)	2
10(b)	22
10(e)	22
10(f)	22
10(k)	2, 5, 20, 22, 23
10(l)	5, 7, 15, 21, 22, 23
301	7, 18
303	*passim*
Lanham Act, 60 Stat. 427, 15 U.S.C. §§ 1051-1127: § 35	15
Miller Act, 49 Stat. 793, as amended, 80 Stat. 1139, 40 U.S.C. 270a *et seq.*	15
Miscellaneous:	
93 Cong. Rec. (1947)	7
S. Speiser, *Attorneys' Fees* (1973)	20

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---

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

This brief *amicus curiae* is filed contingent on the granting of the foregoing motion for leave to file said brief. The interest of the AFL-CIO in this case is set forth in that motion.

STATEMENT OF THE CASE

We consider the following facts to be of special importance:

1. The district court's determination of liability was based entirely on the decision of the National Labor Relations Board, as enforced by the court of appeals,

that the union had violated §§ 8(b)(4)(B) and (D). The district court determined that that decision collaterally estopped the union on the issue of liability. (A. 28-29).[1]

2. The attorneys' fees and related expenses which petitioner seeks to recover were incurred in the unfair labor practice proceedings brought by petitioner Summit against the union before the National Labor Relations Board. One of Summit's exhibits in the district court allocated these fees among the various stages of those proceedings: Beginning of picketing through U.S. District Court injunction; from injunction through § 10(k) proceedings; unfair labor practice proceedings; enforcement of Board order in Court of Appeals for the Ninth Circuit; post-Ninth Circuit proceedings (A. 72-73). Another exhibit allocates the two chronologically, on the basis of the bills submitted by Summit's attorneys (A. 71).[2]

SUMMARY OF ARGUMENT

I. Petitioner gives lip service to the "American rule" "that attorney's fees are not ordinarily recoverable in the absence of a statute or enforceable contract providing therefor." *Fleischmann Corp. v. Maier Brewing Co.*, 386 U.S. 714, 717. However, Petitioner seeks as "damages" the attorneys' fees and other expenses incurred in the proceedings before the National Labor Relations Board arising out of the same unfair labor practice—proceedings which resulted in the determination of liability in this § 303 suit. Such relief was not within the contemplation of Congress when it enacted § 303 and

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[1] "A." refers to petitioner's joint appendix in this Court. "Pet. Br." will refer to the brief for the petitioner.

[2] The respective totals differ. The fees and costs as listed at A. 72-73 amount to $12,549.70; the total according to the table at A. 71 is $13,604.33. Defendant union stipulated that the latter figure is correct (A. 35, 36).

is contrary to the policy of the American rule and the precedence thereunder.

In *Teamsters Union v. Morton*, 377 U.S. 252, 260 this Court held in reliance on the language of § 303 and Senator Taft's explanation thereof "that recovery for an employer's business losses caused by a union's peaceful secondary activities proscribed by § 303 should be limited to actual, compensatory damages." While that legislative history does not conclusively establish that Congress disallowed attorney's fees as damages on Petitioner's theory, it does preclude an interpretation of § 303 which would introduce a novel concept of "damages" into the law. See *Perrin v. United States*, 444 U.S. 37, 42. Petitioner would do just that.

In *Mead v. Retail Clerks Int. Assn., Etc.*, 523 F.2d 1371 the Ninth Circuit rejected the views of three Courts of Appeals which had, in § 303 suits, awarded attorney's fees paid to obtain cessation of picketing which violated § 8(b)(4). The Court said:

> It is not explained, and is not apparent, why the stated reason distinguishes any case in which the plaintiff prevails in prior litigation against the defendant related to the same wrong. The general rule is that in such situations attorneys' fees in the prior action are not recoverable in a subsequent suit. [*Id.* at 1360]

Mead cited with approval the decision of the Supreme Court of Illinois in *Ritter v. Ritter*, 381 Ill. 549, 46 N.E.2d 41 (1943). *Ritter* contains a thorough and valuable analysis of the present problem, demonstrating that the award as damages in one proceeding of attorneys' fees incurred in prior litigation between the same parties arising out of the same subject matter is inconsistent with the American Rule. The *Ritter* Court also cited over twenty decisions in other jurisdictions which as of 1943 had uniformly rejected recovery of such fees. Among those cases is this Court's decision *Flanders v. Tweed*, 15 Wall. (82 U.S.) 450.

Acceptance of the analysis of the *Mead* and *Ritter* and the precedents cited in the latter case will suffice for affirmance. We show also that two recent decisions of this Court strongly reinforce the proposition of that the distinction which Summit would draw between attorneys' fees in this § 303 suit and those expended in the unfair labor practice proceedings is entirely artificial and unprincipled.

In *Fleischmann Corp. v. Maier Brewing*, 386 U.S. 714, (*"Fleischmann"*) this Court refused to allow the plaintiffs to recover attorneys' fees expended by them "at an earlier stage of this litigation" (*id.* at 715), where they *had obtained an injunction* against defendants' deliberate and unlawful infringement of their trademark. The circumstance that under the LMRA injunctions and damages are obtained in separate proceedings does not provide a principled basis for distinguishing *Fleischmann* and allowing recovery of attorneys' fees for obtaining the injunction.

In *F. D. Rich Co. v. Industrial Lumber Co.*, 417 U.S. 116, this Court rejected on principle "one of the oft-repeated criticisms of the American Rule"—that a plaintiff wrongfully run down on a public highway can recover his doctor's bill but not a lawyer's bill. (*Id.* at 128-29). The Court pointed to countervailing considerations, including the injustice of penalizing one party for unsuccessfully defending or prosecuting a lawsuit by requiring it to pay the fees of its opponents counsel. See also *Fleischmann*, 386 U.S. at 718. This rationale weighs with special force here, since the NLRB proceedings for which petitioner seeks to be reimbursed were the predicate of the liability finding in the § 303 suit. And *Rich's* rejection of the asserted parallel between the "doctor's bill" and the "lawyer's bill," where both are attributable to the defendant's wrong, is a conclusive answer to Petitioner's contention, that its attorneys' fees and related costs in obtaining a cessation of picketing "are closely analogous to other elements of compensatory dam-

ages which are routinely awarded under Section 303." (Pet. Br. 17)

The § 303 decisions on which petitioner heavily relies are inadequately reasoned because they fail to address the objections to recovery which were explicated in *Mead*. And the handful of decisions cited by petitioners from other areas of the law are plainly distinguishable: They either involve fees expended in litigation with third parties (which do not come within the American Rule at all) or fall under the bad-faith exception to the American Rule.

II. Petitioner's claim for all its attorneys' fees prior to the § 303 suit must be rejected for two additional reasons.

First, as one Court had recognized, even if recovery of some attorneys' fees could be sustained, those incurred after the injunction is obtained "become too remote to be regarded as a component of the damages flowing from the prior wrong. Where the illegal conduct is over and the Board proceeding is aimed chiefly at securing redress and future protection, we think that the expenses incurred in obtaining that relief are not includable as 'damages' flowing from the illegal act." *F. F. Instrument v. Union de Tronquistas*, 558 F.2d 607, 611 (1st cir.). On this basis plaintiff could not recover for any fees expended after the § 10(l) injunction.

Second, because the General Counsel has the statutory responsibility for obtaining injunctions, prosecuting unfair labor practice complaints and seeking enforcement and contempt adjudications in the Court of Appeals, petitioner was a "volunteer" in those proceedings. As such it may not recover its attorneys' fees. See *Grace v. Ludwig*, 484 F.2d 1262 (2d cir.), *cert. denied* 416 U.S. 905; *Bender v. Crown*, 551 F.2d 169 (7th cir.). On this basis plaintiff would be excluded from recovery except for filing the charge and for the § 10(k) proceedings, in which the General Counsel did not participate.

ARGUMENT

I. PLAINTIFF'S "DAMAGES" THEORY IS FUNDAMENTALLY INCONSISTENT WITH THE "AMERICAN RULE" CONCERNING ATTORNEYS' FEES

In three cases decided in the last fifteen years, this Court has emphatically reaffirmed the "American" rule "that attorney's fees are not ordinarily recoverable in the absence of a statute or enforceable contract providing therefor." (*Fleischmann Corp. v. Maier Brewing Co.*, 386 U.S. 714, 717. See also *F. D. Rich Co. v. Industrial Lumber Co.*, 417 U.S. 116, 126; *Alyeska Pipeline Co. v. Wilderness Society*, 421 U.S. 240, 247. Petitioner acknowledges the validity of that rule to the extent that reimbursement for the fees incurred directly in this § 303 suit are not sought. But petitioner does seek as "damages" the attorneys' fees and other expenses incurred in the proceedings before the National Labor Relations Board arising out of the same unfair labor practice—proceedings which resulted in the determination of liability in this § 303 suit. We show herein that this "damages" theory is not one of the recognized exceptions to the American rule, and is wholly inconsistent with the policies underlying that rule. Before doing so, we begin by showing that the granting of such relief would be inconsistent with Congress' understanding in creating the § 303 remedy.

A. The § 303 remedy was succinctly described in *Teamsters Union v. Morton*, 377 U.S. 252, 260:

> Punitive damages for violations of § 303 conflict with the congressional judgment, reflected both in the language of the federal statute and in its legislative history, that recovery for an employer's business losses caused by a union's peaceful secondary activities proscribed by § 303 should be limited to actual, compensatory damages. [footnotes omitted]

In a footnote to this passage (*id.* at n. 16) the Court described, and treated as authoritative, two statements by Senator Taft concerning this remedy:

> In the Senate debate on the bill, Senator Taft said, "* * * I see no reason why suits of this sort should not be permitted to be filed. After all, it is only to restore to people who lose something because of boycotts and jurisdictional strikes the money which they have lost." 93 Cong.Rec. 4858. Later, in response to Senator Morse's claim that § 303 would impose virtually unlimited liability, Senator Taft said, "Under the Sherman Act the same question of boycott damage is subject to a suit for damages and attorneys' fees. In this case we simply provide for the amount of the actual damages." 93 Cong.Rec. 4872-4873.

That Senator Taft differentiated between "damages" and "attorneys' fees" is even clearer from the continuation of his answer to Senator Morse:

> But the parallel is exactly the same, only under the Sherman Act, if a group of businessmen put a small concern out of business, they are subject to a suit for damages. If a labor union does the same thing, why should it not be subject to a suit for damages? [93 Cong. Rec. 4873]

While Senator Taft did not expressly address the question whether the plaintiff could recover as damages in a § 301 suit the attorneys' fees expended for the purpose of obtaining an injunction against the unlawful activity in filing a charge with the NLRB and in participating in a § 10(l) proceeding brought by the general counsel on behalf of the Board in a district court, or in other NLRB proceedings on that charge, he was clearly aware of the existence of these means for advancing the plaintiff's legal interests as provided for in the Taft-Hartley Act. It would thus have been uncharacteristically disingenuous of Senator Taft to answer Senator Morse as he did if he had contemplated that attorneys' fees in those proceedings could be recovered as § 303 "damages".

Nevertheless we do not claim that Senator Taft's explanations of § 303 conclusively resolve the issue in this case since, as the Ninth Circuit said in *Mead v. Retail Clerks Int. Assn., Etc.*, 523 F.2d 1371, 1380:

> Rejection of the Sherman Act approach does not necessarily imply that *other* attorney fees could not constitute an element of the damages awarded in the section 303 suit. [523 F.2d 1371, 1380, emphasis in original]

At the very least, however, the language and the legislative history of § 303 foreclose petitioner's argument that its claim for attorneys' fees should be sustained on the basis that it accords with the Congressional policy in enacting § 303 (Pet. Br. 19-23).[3] While Congress undoubtedly regarded the unfair labor practices listed in § 8(b)(4) to be serious, and therefore provided a remedy which is not available to a victim of other violations (Pet. Br. 19-21), the legislature confined that remedy to "*the damages by him sustained.*" (This Court's emphasis in *Morton, supra*, 377 U.S. at 260, n. 15). There is no indication that Congress introduced or authorized the courts to create a novel concept of "damages". "A fundamental canon of statutory construction

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[3] Insofar as that argument rests on the supposed inadequacy of the § 303 remedy (Pet. Br. 21-22), the argument is also factually inaccurate. The reported cases reveal that there have been some very substantial awards against unions. See, *e.g., Longshoremen v. Juneau Spruce Co.*, 342 U.S. 237, 240 ($750,000); *Noranda Aluminum, Inc. v. United Brotherhood of Carpenters, Etc.*, 528 F.2d 1304 (8 Cir.), *cert. den.* 429 U.S. 835 ($914,823); *Great Coastal Express Inc. v. International Brotherhood of Teamsters*, 511 F.2d 839, 841 (4 Cir.), *reh. den.* 532 F.2d 956, *cert. den.* 425 U.S. 975 ($806,093). (As noted in *Mead*, 523 F.2d at 1380, n. 10, the damages in *Juneau Spruce* included some unspecified attorneys' fees; of the total in *Noranda* $13,534 represented attorneys' fees and other expenses for activities directed to bring a stop to the strike and picketing, see 382 F. Supp. 1258, 1263 (E.D. Mo.).)

is that, unless otherwise defined, words will be interpreted as taikng their ordinary, contemporary, common meaning. *Burns v. Alcala*, 420 U.S. 575, 580-581 (1975). Therefore, we look to the ordinary meaning of the term ['damages'] at the time Congress enacted the statute in [1947]." (*Perrin v. United States*, 444 U.S. 37, 42; see also *NLRB v. Amax Coal Co.*, —— U.S. ——, 49 U.S.L. Wk. 4880, 4882 (June 29, 1981)).[4] And when we do so we find that from the beginning the American Rule has disallowed the recovery of attorneys' fees as "damages" (*Arcambel v. Wiseman*, 3 Dall. (3 U.S.) 306; *Day v. Woodworth*, 13 How. (54 U.S.) 363; *Flanders v. Tweed*, 15 Wall. (82 U.S.) 450.) And petitioner's contention that damages properly include attorneys' fees incurred by the plaintiff *in a prior proceeding* is unsound in principle and as of 1947 had been universally rejected by the courts, including this Court in *Flanders, supra.*

B. In this case the court below decided that the plaintiff in a § 303 suit may not recover as damages his attorneys' fees and other costs in the related unfair labor practice proceeding primarily on the authority of *Mead v. Retail Clerks Int. Assn., Etc.*, 523 F.2d 1371 (9th Cir.) (hereafter "*Mead*"). In *Mead*, the Ninth Circuit acknowledged that some other courts had awarded such fees as damages, and carefully explained the basis for its disagreement:

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[4] Cf. *Brown v. GSA*, 425 U.S. 820, 825:

> Congress simply failed explicitly to describe § 717's position in the constellation of antidiscrimination law. We must, therefore, infer congressional intent in less obvious ways. As Mr. Chief Justice Marshall once wrote for the Court: "Where the mind labours to discover the design of the legislature, it seizes every thing from which aid can be derived . . . ." *United States v. Fisher*, 2 Cranch 358, 386 (1805).

> The earliest case awarding such attorneys' fees simply asserts that fees paid "to bring about the removal of the picket line . . . are proper items of damages." *Teamsters Local 884 v. HumKo Co.*, 287 F.2d 231, 243 (6th Cir. 1961). Subsequent cases simply cite the prior decisions, adding nothing to the rationale.
>
> It is not explained, and is not apparent, why the stated reason distinguishes any case in which the plaintiff prevails in prior litigation against the defendant related to the same wrong. The general rule is that in such situations attorneys' fees in the prior action are not recoverable in a subsequent suit. Expenses of prior litigation, including attorneys' fees, may be recovered where, because of a defendant's wrongful conduct, the plaintiff was forced to prosecute or defend an action involving a third party. But attorneys' fees may not be recovered where the prior litigation involved the same parties, especially when the earlier action was instituted by plaintiff to secure redress for defendant's wrongful conduct. "[W]here an action based on the same wrongful act has been prosecuted by the plaintiff against the defendant to a successful issue, he can not in a subsequent action recover, as damages, his costs and expenses in the former action." *Ritter v. Ritter*, 381 Ill. 549, 46 N.E. 2d 41, 44 (1943). As Professor McCormick put it, "Obviously a party who wins a lawsuit cannot escape the rule that expenses of litigation beyond taxable costs are not recoverable by merely instituting a new suit for such expense in the first case." C. McCormick, Damages § 67 at 149 (1935). *See generally id.* §§ 66-68; 25 C.J.S. Damages § 50e; 22 Am.Jur.2d Damages § 165. [523 F.2d at 1380-1381]

The Supreme Court of Illinois' 1943 decision in *Ritter*, which was approvingly cited in *Mead*, is indeed directly in point, for, as stated in *Ritter*:

> The question for decision is as to the right of a plaintiff who is successful in a prior suit to recover

> damages from the defendant in the former suit, the measure of which is for time expended, attorney fees and items paid out in prosecuting the prior litigation, the claim being exclusive of costs which may be taxed in the first action pursuant to statutory authorization. [381 Ill. at 550-551, 46 N.E. 2d at 43]

The *Ritter* analysis as to why the plaintiff has no such right merits extensive quotation. After setting forth the American Rule that the common law does not permit a successful litigant to recover from his losing adversaries the costs and expenses of the litigation (381 Ill. at 551-553, 46 N.E. 2d at 43) the *Ritter* opinion demonstrated why recovery of such attorneys' fees in a subsequent suit as damages proximately caused by the defendant's wrongful conduct would be inconsistent with that Rule:

> It may be that the statutory costs awarded to a successful plaintiff are inadequate to compensate him for the injury caused by the defendant's wrongful conduct, but the question of the amount of costs which are to be allowed the successful party and the items of expense to be included therein is a question to be determined by the legislature and not by the courts. * * *
>
> The plaintiffs argue that they are entitled to recovery in a separate action because the wrongful conduct of the defendant caused them to engage in litigation with him to secure a return of their propentry and that as a proximate result of the defendant's wrongful conduct they were damaged to the extent of the loss of time, attorney fees and other expenses expended by them in the first litigation. This reasoning is based on the concept that the wrongful acts of the defendant created a liability over and above his liability in the original action, i.e., a tort liability to pay the expenses of the plaintiffs in enforcing their rights in the first suit. The defendant had the right to resist their claim and if plaintiffs wished to establish their right it was

necessary for them to resort to litigation. If, in the process of the procedure necessary to the establishment of plaintiffs' claim, they were compelled to employ the services of lawyers and incur other expenses it was but an incident attached to the asserting and enforcement of their right to have their property conveyed to them, and defendant's conduct in withholding the title until compelled by litigation to surrender does not constitute a breach of any duty he owed plaintiffs for which a separate action can be maintained.

Plaintiffs rely on cases which support the general rule that where the wrongful acts of a defendant involve the plaintiff in litigation with third parties or place him in such relation with others as to make it necessary to incur expense to protect his interest, the plaintiff can then recover damages against such wrongdoer, measured by the reasonable expenses of such litigation, including attorney fees. * * * These cases are not in point and the situation is dissimilar. While it is recognized that where the natural and proximate consequences of a wrongful act have been to involve the plaintiff in litigation with others, there may be a recovery in damages against the author of such act, measured by the reasonable expenses incurred in such litigation * * * yet the rule is equally well established that where an action based on the same wrongful act has been prosecuted by the plaintiff against the defendant to a successful issue, he can not in a subsequent action recover, as damages, his costs and expenses in the former action. * * *

The policy of the rule is obvious. If the wrongful conduct of a defendant causing the plaintiff to sue him would give rise to an independent tort and a separate cause of action, there would be no end to the litigation, for immediately upon the entry of judgment the plaintiff would start another action against the defendant for his attorney fees and expenses incurred in obtaining the preceding judgment.

> The rule contended for by the plaintiffs could not be limited to cases of constructive trust, for in many other classes of suits the action is necessitated by the defendant's wrongful conduct. If the plaintiff is successful in the suit, the probability is that the conduct of the defendant causing the suit was wrongful. When a defendant breaches a lease, violates the terms of a contract, commits a tort, misrepresents goods sold, unlawfully retains the personal property of the plaintiff, or remains in possession of real estate after the expiration of his tenancy, necessitating proceedings, his conduct is wrongful and may require a suit against him by the plaintiff. Under our jurisprudence the defendant may present any defense to such an action that he may have or that he may deem expedient, and in so doing he will not be subjecting himself to a second suit by the plaintiff based on the wrongful conduct of the defendant in causing the plaintiff to sue him or in defending the action. The rule is the same even though the wrongful conduct of the defendant is willful, intentional, malicious or fraudulent. [389 Ill. at 553-555, 46 N.E. 2d at 43-44, citations omitted.]

The Supreme Court of Illinois concluded by examining the law of other jurisdictions:

> We find no case in which a recovery such as the plaintiffs seek here has been allowed. The cases all confirm the rule that attorneys fees and expenses of litigation can not be recovered in a subsequent suit as damages by a successful plaintiff who has been forced into litigation by reason of the defendant's wrongful conduct. [381 Ill. at 557, 46 N.E. 2d at 45.]

That court then cited over twenty cases which were in accord with its views (*id.*).

Among the many cases cited in *Ritter* was *Flanders v. Tweed*, 15 Wall. (82 U.S.) 450, which was also cited as an early exemplar of the American Rule in *Alyeska*, 421 U.S. at 250 and 254. In *Flanders*, the plaintiff had, in a sequestration suit, obtained possession of cotton

which the defendant had unlawfully detained (*id.* at 450-451). Plaintiff thereafter sued for damages arising out of the unlawful seizure and detention, and claimed as part of those damages the attorneys' fees expended in the sequestration suit. This Court held (*id.* at 452-453) that those fees were not recoverable, citing the then-leading case on the American Rule, *Day v. Woodworth*, 13 How. (54 U.S.) 363. The circumstance that the services for which the fee was sought had been performed in a prior proceeding, rather than in the action in which they were sought to be recovered as damages was apparently deemed to be irrelevant, since it was not mentioned in following *Day*. Because the Court did not specifically discuss the distinction which Summit proffers here, we do not go so far as to say that *Flanders* alone would control here. We do say, however, that *Flanders* and the other cases cited in *Ritter* evidence a general understanding that the American Rule does not allow recovery, as damages, for attorneys' fees in earlier, related proceedings, and that Congress' enactment of a damage remedy in § 303 of the LMRA must be construed against this legal background.

C. Two of this Court's recent decisions respecting attorneys' fees strongly reinforce the proposition that the distinction which Summit would draw between attorneys' fees in this 303 suit and those expended in the unfair labor practice proceedings is entirely artificial and unprincipled.

In *Fleischmann Corp. v. Maier Brewing*, 386 U.S. 714, (*"Fleischmann"*) this Court refused to allow the successful plaintiffs in a Lanham Act suit to recover attorneys' fees expended by them "at an earlier stage of this litigation" (*id.* at 715). At that earlier stage the plaintiffs *had obtained an injunction* against defendants' deliberate and unlawful infringement of their trademark. See *Maier Brewing Company v. Fleischmann Distilling Corp.*, 359 F.2d 156, 156 (9th Cir. *en banc*); cf. that court's earlier decision directing the entry of an injunction, 314

F.2d 149, 161-162. Defendants' liability under the Lanham Act and their obligation under § 35 of that Act to pay, *inter alia*, "any damages sustained by the plaintiff" (see 386 U.S. at 715, n.1) was established in those injunction proceedings. In *Fleischmann* those proceedings were part of the same action, whereas here liability was determined in separate unfair labor practice proceedings the result of which were held to be binding in the § 303 suit on collateral estoppel principles. Thus, in substance, the earlier injunction stage of the *Fleischmann* litigation and the ancillary § 10(l) and unfair labor practice proceedings here have the same function of ending a continuing injury and establishing liability. To be sure, here liability was determined in separate unfair labor practice proceedings the result of which were held to be binding in the § 303 suit on collateral estoppel principles. But given the realities, the existence of collateral remedies for an unfair labor practice (including the opportunity to obtain an injunction in a § 10(l) suit brought by the General Counsel on behalf of the Board) provides no principled basis for treating attorneys' fees expended in obtaining an injunction and establishing liability as recoverable although they are not in a case such as *Fleischmann*, or any other "case in which the plaintiff prevails in prior litigation against the defendant related to the same wrong." (*Mead*, 523 F.2d at 1380; see also the paragraph of the quotation from *Ritter* at pp. 12-13, *supra*.

In *F. D. Rich Co. v. Industrial Lumber Co.*, 417 U.S. 116 (*"Rich"*) this Court held that attorneys' fees are not available as a remedy in suits under the Miller Act. While *Rich* differs from the present case in that the plaintiff there did not seek recovery of attorneys' fees expended in a related proceeding, this Court squarely confronted and rejected the view that attorneys' fees should be awarded because the policy of the statute was to make the plaintiff whole. This Court said:

> Finally, the Court of Appeals intimates that in providing that Miller Act claimants should recover

> the "sums justly due," 40 U.S.C. § 270b(a), Congress must have intended to provide for the award of attorneys' fees because without such fee shifting, Miller Act claimants would not be fully compensated—the claimant's recovery would always be diminished by the cost of his legal representation. This argument merely restates one of the oft-repeated criticisms of the American Rule. Almost a half century ago, the Massachusetts Judicial Council pleaded for reform, asking, "On what principle of justice can a plaintiff wrongfully run down on a public highway recover his doctor's bill but not his lawyer's bill?" We recognize that there is some force to the argument that a party who must bear the costs of his attorneys' fees out of his recovery is not made whole. But there are countervailing considerations as well. We have observed that "one should not be penalized for merely defending or prosecuting a lawsuit, and that the poor might be unjustly discouraged from instituting actions to vindicate their rights if the penalty for losing included the fees of their opponents' counsel." *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 718 (1967). Moreover, "the time, expense, and difficulties of proof inherent in litigating the question of what constitutes reasonable attorney's fees," *ibid.*, has given us pause, even though courts have regularly engaged in that endeavor in the many contexts where fee shifting is mandated by statute, policy, or contract. Finally, there is the possibility of a threat being posed to the principle of independent advocacy by having the earnings of the attorney flow from the pen of the judge before whom he argues. [417 U.S. 128-129, footnotes omitted.]

Rich's holding that the policy underlying the American Rule requires denial of "his lawyer's bill" even though the plaintiff may "recover his doctor's bill" where both are attributable to the defendant's wrong, is a conclusive answer to Summit's contention that its attorneys' fees and related costs in obtaining a cessation of picket-

ing "are closely analogous to other elements of compensatory damages which are routinely awarded under Section 303." (Pet. Br. 17)

It would be particularly unfair and contrary to the policy of the American Rule to allow the plaintiff to recover attorneys' fees expended in the related unfair labor practice proceeding. For, the NLRB's decision therein, and its affirmance by the court of appeals were the predicate, as a matter of collateral estoppel, for establishing the union's liability in this § 303 action (A.28-29). The union lawfully and properly defended against the allegations of liability and paid its own attorneys' fees as necessary for that defense. If the union had prevailed before the Board the union could not have recovered its attorneys' fees from Summit; nor, having lost should it be required to pay Summit's fees. See *Fleischmann*, 386 U.S. at 718; *Rich*, 417 U.S. at 129.[5]

D. Petitioner's principal reliance is on the fact that its position is the "prevailing rule" among the courts of appeals in § 303 cases. (Pet. Br. 13).[6] However, this

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[5] Requiring the union to pay for Summit's fees would be doubly unfair because, as discussed at pp. 21 to 22, *infra*, Summit was a volunteer once the General Counsel determined to proceed on its unfair labor practice charge.

[6] Although petitioner relies, *inter alia*, on *F. F. Instrument Corp. v. Union de Tronquistas de Puerto Rico*, 558 F.2d 607 (1st Cir.) (Pet. Br. 13, n. 10; 14). The First Circuit did not decide that attorneys' fees for any of the Board proceedings are recoverable (a question which it left open), but did decide that if such recovery was allowable it should not extend beyond the issuance of the injunction. (558 F.2d at 611-612). Thus, as we develop in Point II, *infra*, acceptance of the First Circuit approach would require rejection of most of Summit's claim. Indeed, the First Circuit, after quoting with approval from *Mead*, made the following highly pertinent observation:

> Allowing attorney's fees for the unfair labor practice case would also create this anomaly: the cost of proving liability

Court decides cases on the basis of a majority vote of the Justices, rather than of the courts of appeals which have passed on the same question. See, *e.g.*, *Fleischmann*, *supra*, 386 U.S. at 715-716 n.4; *Alyeska*, *supra*, 421 U.S. at 270, n.46. It is the validity of the reasoning of the lower courts which is of significance here. On this basis the opinions of the Ninth Circuit in *Mead* and of the Supreme Court of Illinois in *Ritter* are, as we have shown, deserving of considerably more respect than those of the courts of appeals which have allowed recovery of attorneys' fees in § 303 suits without answering the question posed in *Mead*—"why [the fact that the fees were expended to remove the picket line] distinguishes any case in which the plaintiff prevails in prior litigation against the defendant related to the same wrong" (523 F.2d at 1380). Nor have those courts otherwise explained how such recovery is consistent in principle with the American Rule.

The non-§ 303 cases allowing attorneys' fees and related costs of litigation which are cited at Pet. Br. 18-19 are readily distinguishable. As was explained in *Rich*, 417 U.S. at 129 and *Alyeska*, 421 U.S. at 258-259, the award in *Vaughan v. Atkinson*, 369 U.S. 527, 530-531 was an application of a familiar exception to the American Rule which allows such fees where the losing party has "acted in bad faith, vexatiously, wantonly, or for oppressive reasons * * *". And while we readily agree that the "law of indemnity has long recognized attorneys'

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directly through a § 303 suit would be non-compensable; however, if the employer used the unfair labor practice proceeding to establish liability collaterally he could recover a large portion of the attorney's fees. [558 F.2d at 611, n. 5]

We note also that *Eazor Express, Inc. v. International Brotherhood of Teamsters, Etc.*, 520 F.2d 951, 972 (3d Cir.), *cert. den.* 424 U.S. 935 (Pet. Br. 13, n. 11) arose under § 301, and not under § 303. We mention this only for the sake of accuracy; the principle is the same under both provisions, and in our submission the Third Circuit was wrong in *Eazor*.

fees to be an element of compensatory damages in those kinds of cases" (Pet. Br. 18), those cases rest on the principle that the defendant's wrongful conduct has required the plaintiff to pay for the cost of litigation against some *third party*, where the defendant wrongfully breached its obligation to undertake that representation itself. The duty of fair representation cases referred to at Pet. Br. 18-19 rest on the same principle; see also, *Vaca v. Sipes*, 386 U.S. 171, 197-198.[7] The

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[7] Summit seeks to bring itself within the exception to the American Rule, "in which the plaintiff's successful litigation confers 'a substantial benefit on the members of an ascertainable class, and where the court's jurisdiction over the subject matter of the suit makes possible an award that will operate to spread the costs proportionately among them.'" (*Hall v. Cole*, 412 U.S. 1, 5, quoting *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 394-394). It is Summit's contention that because the injunction proceedings mitigated its damages the union should pay for the benefit thus conferred (Pet. Br. 22). Summit's position would thus allow recovery as damages wherever the plaintiff has obtained an injunction where the defendant's misconduct, if continued, would cause compensable injury. For example, Summit's theory would allow the recovery of attorneys' fees in cases like *Fleischmann*, see p. —, *supra*.

Not only does Summit's argument prove too much, but it rests on a misunderstanding of the equitable exception which Summit invokes. In *Hall* the defendant union was required to pay attorneys' fees not *qua* defendant, but because as a membership organization the union comprised all the members as a group whose rights were deemed to have been vindicated by the plaintiff's suit (412 U.S. at 7-9). Such shifting of the attorneys' fees to the entire class which benefitted has its "origins in the 'common fund' cases, which have traditionally awarded attorneys' fees to the successful plaintiff when his representative action creates or traces a 'common fund,' the economic benefit of which is shared by all members of the class." (412 U.S. at 5, n. 7; see also *Alyeska*, 421 U.S. at 257-258); But Summit is not a member of any class that includes the union or its members; it was pursuing only its own objectives by asserting and perfecting its claim that the union had violated § 8(b)(4). If it created a benefit for the union at all, it did so only in the limited sense that it reduced the damages which it otherwise might have obtained from the union, and that is not the kind of benefit

Mead and *Ritter* opinions properly distinguish between the recovery of attorneys' fees expended in suits against third parties as a result of the defendant's wrongful conduct and suits like the present where attorneys' fees are claimed from the original defendant. The false arrest cases also fit within this category, which does not implicate the policy of the American Rule. See pp. 10 and 12, *supra*.[8] The award in the malicious prosecution cases is consistent with the "bad faith" exception to the American Rule. While a party who has in good faith prosecuted or defended his interests should not be required, if he loses, to pay his adversary's litigation expenses (see, *e.g.*, *Rich*, 417 U.S. at 129), there is no justification for thus protecting a party who has engaged in bad-faith litigation.

II. EVEN IF PETITIONER COULD AVOID THE "AMERICAN RULE" IT COULD RECOVER ONLY A SMALL PART OF THE ATTORNEYS' FEES CLAIMED

A. Petitioner's theory is that the "legal expenses sought here were *directly caused* by the illegal activity. When a secondary boycott occurs, as it did in this case, reasonable legal action and consequent legal expenses to stop the activity and compel resumption of the *status quo* are obviously foreseeable consequences of engaging in such activity." (Pet. Br. 16, emphasis in original). But even if, notwithstanding the American Rule this theory would justify an award for fees which were in-

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envisioned by *Hall* and *Mills* and their equitable antecedents. Indeed, the union and its members suffered a loss as a result of the Labor Board proceedings since it was determined that they could not engage in strike activity which was in their economic interest, and because it was determined that employees represented by another union were entitled to perform work which they sought (see the Board's decision in the § 10(k) proceeding, A. 73-81).

[8] See also S. Speiser *Attorneys' Fees*, § 13.4 (1973).

curred in obtaining the injunction, it would not support an award for fees spent in subsequent litigation. This point was firmly grasped and articulated by the First Circuit in *F. F. Instrument v. Union de Tronquistas*, 558 F.2d 607. The Court noted that these Circuits had adopted the rule "that 'cost of reasonable legal action taken . . . to effect a resumption of work may be recovered.'" (*id.* at 610, quoting *Sheet Metal Workers, etc. v. Atlas Sheet Metal Co.*, 384 F.2d 101, 110 (5th Cir.)), and noting also the Ninth Circuit's contrary rule in *Mead*. That court then said:

> Even if we were to adopt this rule [of the Fifth, Sixth and Eighth Circuits], we would not go beyond it. The statute permits recovery of "damages . . . sustained" by a person "by reason of any violation" of § 8(b)(4). Where attorney's fees are incurred in removing an illegal picket line or otherwise directly in mitigation of harm, fees are closely related to the illegality. But at some point the injured employer's continuing struggles with the offending Union, even if justified from the former's viewpoint, become too remote to be regarded as a component of the damages flowing from the prior wrong. Where the illegal conduct is over and the Board proceeding is aimed chiefly at securing redress and future protection, we think that the expenses incurred in obtaining that relief are not includable as "damages" flowing from the illegal act. [558 F.2d at 611]

On this reasoning, petitioner could not recover any legal expenses incurred after the § 10(l) injunction was granted. In citing *F. F. Instruments* petitioner neither reconciles its claim with what the First Circuit there decided nor refutes that court's persuasive analysis. Any attempt to do either would be futile.[9]

B. There is a further reason why petitioner could recover only a small fraction of its fees even if its damage

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[9] Of course, once the § 10(l) injunction issued petitioner was in no way mitigating its damages; it was seeking to impose damages on the union by establishing an estopped.

causation theory were otherwise accepted. Once the General Counsel had determined to issue a complaint on petitioner's § 8(b)(4) unfair labor practice charge petitioner participated as a "volunteer" in all of the subsequent litigation, with but a single exception—the § 10(k) proceeding. The General Counsel by statute carried the laboring oar in seeking the § 10(l) injunction, prosecuting the unfair labor practice complaint, obtaining an enforcement of the Board's order and prosecuting the contempt proceeding (which did not result in a court order). See §§ 10(b), (e), (f) and (l) of the LMRA; *Amalgamated Workers v. Edison Co.*, 309 U.S. 261. While petitioner clearly had a right to participate as a party before the Board in an enforcement proceeding, and § 10(l) also permitted it to assist in the district court, petitioner was not required to do so. Under like circumstances, involving a claim for services in an SEC proceeding, the Second Circuit has squarely ruled that recovery is not allowed unless the result sought would not have been obtained "*but for* [the attorneys'] intervention". (*Grace v. Ludwig*, 484 F.2d 1262, 1268, *cert. den.*, 416 U.S. 905 (emphasis in original)). The complaint herein, like that in *Grace* (*id.* at 1269), does not allege that "but for" its participation the district court would not have issued the § 10(l) injunction, the NLRB would not have found an unfair labor practice, or the Ninth Circuit would not have enforced the Board's order. Accordingly, the reasoning of the Second Circuit in *Grace* is equally applicable here:

> Assuming that LLB did pull the "laboring oar" in the proceeding before the SEC, it was in the interest of a substantial minority stockholder and it was the basis for a not insignificant fee. The fact that the SEC permitted admittedly able and persistent counsel to man the oars does not at all establish that the vessel would have otherwise foundered. LLB must then be characterized as a mere volunteer who aids a public body or trust in

the performance of their official duties on behalf of a certain class, but who is not entitled to compensation. Edison Light & Power Co. v. Pennsylvania Pub. Util. Comm'n, 34 F.Supp. 939 (E.D.Pa. 1940), aff'd on the opinion below, 119 F.2d 779 (3d Cir. 1941); King v. City of Covington, 289 Ky. 695, 160 S.W.2d 13 (1942); City of Englewood v. Allison Land Co., 45 N.J.Super. 538, 133 A.2d 680 (App. Div. 1957); In re Katz' Estate, 40 N.J.Super. 103, 122 A.2d 185 (Super.Ct. 1956); Peoples-Pittsburgh Trust Co. v. Pittsburgh United Corp., 334 Pa. 107, 5 A.2d 890 (1939). See Restatement of Restitution § 115, comment *a*, at 482 (1937). [484 F.2d at 1269; see also *Bender v. Crown*, 551 F.2d 169 (7 Cir.), a case arising out of the same SEC proceeding, where the court "adopt[ed] the reasoning and result of" *Grace*.]

We submit that the *Grace* analysis is sound and should be approved here as well if the Court does not agree with Point I hereof.

In *F. F. Instrument*, *supra*, the court did not allow any attorneys' fees, because some were clearly not recoverable and the plaintiff had not apportioned its legal expenses. 558 F.2d at 611-12. In this case, plaintiff did so apportion, although there is some confusion between the pertinent tables it presented. See p. 2, n.2, *supra*. Accordingly, if the court rejects our submission in Point I, of this brief, it should remand the case to the District Court to allow the plaintiff to establish whatever fees would be recoverable. This would mean, if Point IIA and IIB hereof are accepted, plaintiff could recover only the fees expended in preparing the unfair labor practice charge; if IIA alone is accepted the fees expended in the § 10(l) proceedings would also be allowed and if Point IIB alone is accepted the fees expended in the § 10(k) proceeding would be included.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

J. ALBERT WOLL
815 15th Street, N.W.
Washington, D.C. 20005

LAURENCE GOLD
815 16th Street, N.W.
Washington, D.C. 20006
202-637-5390
(Counsel of Record)

Of Counsel:

GEORGE KAUFMANN
2101 L Street, N.W.
Washington, D.C. 20037